Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BRICKLAYERS AND ALLIED CRAFTWORKERS LOCAL 1, and MARK KING,

Petitioners,

v.

J & J CONSTRUCTION COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Michigan

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the First Amendment's Petition Clause, statements addressed to government representatives critical of a third party's performance of a public function or fitness to perform a public function are entitled to the protection of the "actual malice" standard of *New Times Co. v. Sullivan*, 376 U.S. 254 (1964), against defamation claims brought by the third party.

PARTIES TO THE PROCEEDING

The caption of the case includes all parties to the proceeding in the courts below.

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PETITION FOR A WRIT OF CERTIORARI

Bricklayers and Allied Craftworkers Local 1 and Mark King petition for a writ of certiorari to review the judgment of the Michigan Supreme Court in *J & J Construction v. Bricklayers Local 1*, Mich. Sup. Ct. No. 119357.

OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported at 468 Mich. 722, 664 N.W.2d 728 and is attached as Appendix A, pp. 1a-36a. The opinion of the Michigan Court of Appeals is reported at 245 Mich. App. 722, 631 N.W.2d 42 and is attached as Appendix B, pp. 37a-55a. The decision and judgment of the Wayne County Circuit Court are unreported and are attached as Appendix C, pp. 56a-77a. The order of the Michigan Supreme Court denying rehearing is reported at 668 N.W.2d 910 and is attached as Appendix D, p. 78a.

JURISDICTION

The judgment of the Michigan Supreme Court was entered on July 9, 2003. A timely petition for rehearing was denied on September 15, 2003. The jurisdiction of this Court in invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

1. Respondent, J & J Construction Company, brought this defamation suit against Petitioners, Bricklayers and Allied Craftworkers Local 1 and Local 1's business agent Mark King, alleging, *inter alia*, that King made false statements about the quality of the Company's work at a meeting of the City Council of Wayne, Michigan in the course of urging the City Council to reject the Company's bid to perform masonry work on a public construction project.

After a bench trial, the trial court, applying a negligence standard, entered judgment for the Company on its defamation claim. Pet. App. 75a.

The Michigan Court of Appeals reversed the trial court's judgment, holding that, under the First Amendment's Petition Clause, King's statements to the City Council were protected against the Company's defamation claim by the "actual malice" standard established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Pet. App. 54a-55a.

The Michigan Supreme Court, in a 5-2 decision, reversed the Court of Appeals' decision, holding that the *New York Times* "actual malice" standard does not apply to the defamation claim in this case and reinstated the judgment in favor of the Company. Pet. App. 9a.

The Michigan Supreme Court majority read *McDonald v. Smith*, 472 U.S. 479 (1985), to stand for the proposition that the private-figure/public-figure dichotomy drawn in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), applies to defamation claims based on statements made in the course of petitioning the government. Pet. App. 9a. And, applying the *Gertz* dichotomy, the majority concluded that the *New York Times* standard does not apply to the Company's defamation

claim here on the ground that the Company is not a "public figure." *Id.*

Justice Young, the author of the majority opinion, concurred separately to express his "hope that the United States Supreme Court may choose an alternative course to the one suggested by *McDonald*." Pet. App. 12a.

Two Michigan Supreme Court Justices dissented on the ground that *McDonald*, properly read, *requires* application of the *New York Times* "actual malice" standard to all defamation claims against petitioning activity. Pet. App. 32a-33a.

2. The circumstances that generated this case are the following:

Respondent J & J Construction Company is a non-union masonry contractor doing business within the jurisdiction of Bricklayers Local 1. Pet. App. 2a. In 1995, the Company submitted the lowest bid to perform masonry work on a public construction project being undertaken by the City of Wayne, Michigan. *Id.* at 1a.

Local 1 business agent King addressed a public meeting of the Wayne City Council urging the Council to reject the Company's bid. Pet. App. 38a. In advocating his position to the City Council, King made three points. First, King showed the Council pictures he had taken of the Company's masonry work on another public project and explained why he considered that work to be substandard. *Id.* Second, King stated his belief that the Company would have trouble completing the project in a timely fashion. *Id.* Third, King stated that the Company did not compensate its employees at the prevailing rates required by the law governing public contracts in Michigan. *Id.*

After King spoke, the privately employed project manager overseeing the City's construction project addressed the City Council to defend the quality of the Company's masonry

work. *J & J Construction v. Bricklayers Local 1*, Mich. Sup. Ct. No. 119357, Appellants App. pp. 46a-47a.

Having heard from King and the project manager, the Wayne City Council voted to refer the bids for masonry work to the project manager for further review. *J & J Construction v. Bricklayers Local 1*, Mich. Sup. Ct. No. 119357, Appellants App. p. 22a.

Two weeks later, the project manager submitted a report to the City Council addressing the allegations that the Company had performed poor work on another project and did not pay its employees the prevailing wage. With respect to the first allegation, the project manager reported that "[a]fter a thorough review of J & J Construction's past jobs that were specifically mentioned at the May 31, 1995 Council Meeting, we have found that in every case the quality was good." *J & J Construction v. Bricklayers Local 1*, Mich. Sup. Ct. No. 119357, Appellees App. p. 1b. With respect to the prevailing wage allegation, the report referred the City Council to an attached memorandum from the Company, which "stat[ed] how they would substantiate information for a State of Michigan prevailing wage audit." *Id.* In this regard, the report added that "if the masonry union formally requested an audit of J & J Construction certified payroll, the City would have to provide the manpower and assume the cost for such an audit." *Id.* The report concluded by suggesting that, "[i]f the City of Wayne does not want to incur this [audit] cost, then they have the option to go to the next qualified bidder." *Id.*

Five days after receiving the project manager's report, the City Council voted to award the contract to the next lowest bidder and not to the J & J Construction Company. *J & J Construction v. Bricklayers Local 1*, Mich. Sup. Ct. No. 119357, Appellants App. p. 26a. The minutes of the City Council meeting explain this action by noting that "the Council had concerns as to the low bidder because of claims

made about faulty workmanship and because of concerns about noncompliance with the payment of prevailing wages and fringe benefits." *Id.*

3. On the heels of the Wayne City Council decision, the Respondent Company brought this defamation suit in the Wayne County Circuit Court against Petitioners King and Bricklayers Local 1.[1]

After a bench trial, the trial court held that "the statements made about the poor quality of the work to the Wayne City Council were in fact comments that were defamatory and did in fact cost J & J Construction the Wayne Aquatic Center job." Pet. App. 68a. In so holding, the trial court applied a negligence standard on the ground that "there is no qualified

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[1] While not of the moment at this juncture, we note that the Company's complaint also included a claim for tortious interference with business expectancy based on King's statements to the Wayne City Council. The trial court treated the Company's tortious interference claim as derivative of its defamation claim. Thus, the trial court found for the Company on the tortious interference claim on the ground that "an act of slander or defamation can in fact amount to an improper interference." Pet. App. 70a. And, the trial court did not award any damages for this claim beyond those awarded on the defamation claim.

The Michigan Court of Appeals, in reviewing the trial court's judgment, held that the tortious interference with business expectancy claim was completely barred by this Court's decisions in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). Pet. App. 44a-45a.

The Michigan Supreme Court, in its turn, did not reach the question of whether the tortious interference with business expectancy claim was barred by the *Noerr/Pennington* doctrine and thus left the Court of Appeals' decision in this regard undisturbed. Pet. App. 10a. Moreover, without regard to the question of *Noerr/Pennington* immunity, the trial court's judgment on the tortious interference claim would fall automatically if, as we claim here and as the Michigan Court of Appeals held, its underlying defamation determination is legally erroneous.

privilege in this particular case in light of the fact that . . . J & J Construction was a private figure, and was not a public official." *Id.* at 65a. At the same time, the trial court found that the Respondent had *not* proven that King's statements regarding its failure to compensate its employees at the required prevailing wages rates were false. *Id.* at 63a.

On this basis, the court awarded the Company defamation damages in the amount of lost profits on the Wayne project. Pet. App. 70a. In addition to awarding the Company its lost profits on the Wayne contract, the court exercised its discretion under the Michigan defamation statute to award the Company its attorneys fees in bringing the defamation claim. *Id.* at 72a. Finally, the court found that the Company's general business reputation had not been harmed by King's statements to the City Council and did not make any award for that alleged injury. *Id.*

4. In reviewing the trial court's judgment on the defamation claim, the Michigan Court of Appeals began by noting that, generally, "[o]rdinary negligence is sufficient in proving a case of defamation of a private figure in Michigan." Pet. App. 53a. Against that background, that court found that "[t]he question is whether that standard changes if the alleged defamation takes the form of petitioning a governmental entity." *Id.*

The Court of Appeals decided this issue by analyzing this Court's decision in *McDonald v. Smith*, 472 U.S. 479 (1985). Pet. App. 53a-54a. That court read *McDonald* to require the application of the *New York Times v. Sullivan* "standard of known falsehood or reckless disregard of the truth." *Id.* at 54a. That being so, the court concluded that "the trial court erred in confining its inquiry to ordinary negligence" and "remand[ed] the case to the trial court for reevaluation of the evidence under that standard." *Id.* at 55a.

5. On appeal, the Michigan Supreme Court "reverse[d] the judgment of the Court of Appeals that the 'actual malice' qualified immunity standard of *New York Times* applies in *Petition Clause* defamation cases regardless whether the plaintiff is a private or public figure" and reinstated the trial court's defamation judgment in favor of the Company. Pet. App. 9a (emphasis in original).

Like the Michigan Court of Appeals, the Michigan Supreme Court treated the question of the proper defamation standard as one governed by *McDonald v. Smith*. But the Supreme Court majority read *McDonald* as standing for the proposition that "the right to petition should be accorded no greater protection than the rights to free speech and free press." Pet. App. 9a. It followed, according to the majority, that "the private-figure and public-figure dichotomy that applies to defamation claims involving the *Free Speech Clause and the Free Press Clause* also applies to defamation claims involving the Petition Clause" and that "private-figure defamation plaintiffs are only constitutionally required to prove ordinary negligence in order to establish defamation in cases involving the right to petition." *Id.* at 9a & 11a (citation omitted, emphasis in original). In other words, the majority read *McDonald* as standing for the proposition that "[n]o qualified immunity is constitutionally provided to defamation defendants whose statements about private figures are made while petitioning the government." *Id.* at 11a.

Justices Cavanagh and Kelly dissented on the ground that "to interpret *McDonald* as incorporating the public-figure and private-figure dichotomy is a misreading of the case" and the decision is better understood "as employing the actual-malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)." Pet. App. 33a.

REASONS FOR GRANTING THE PETITION

As a matter of the most basic First Amendment principles, statements addressed to government representatives critical of a third party's performance of a public function or fitness to perform a public function are entitled to the protection of the "actual malice" standard of *New Times Co. v. Sullivan*, 376 U.S. 254 (1964), against defamation claims brought by the third party.

The salient point, as trenchantly stated by Judge Easterbrook in his Seventh Circuit opinion upholding a jury instruction that "only evidence satisfying the *New York Times* [actual malice] standard would permit an award of damages" on such a defamation claim, is this:

> "The first amendment prohibits efforts to ensure 'laboratory conditions' in politics; speech rather than damages is the right response to distorted presentations and overblown rhetoric. A campaign to influence [government representatives] is classic political speech; it is direct involvement in governance, and only the most extraordinary showing would permit an award of damages on its account." *Stevens v. Tillman*, 855 F.2d 394, 403 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989).

As the Michigan Supreme Court's decision in this case shows, nonetheless the lower court law in this regard—which as a matter of constitutional principle should be uniform—is in conflict. While the Seventh Circuit and the highest courts of Maryland and Washington do accord petitioning statements the full protection of the *New York Times* "actual malice" standard, the Michigan Supreme Court and the Eighth Circuit do *not* accord petitioning statements such protection.

As the decision below also shows, the conflict and confusion in the lower courts cannot be traced to any disagreement over basic First Amendment principles. Rather,

the division among the lower courts rests on their disagreement concerning the proper reading of this Court's decision in *McDonald v. Smith*, 472 U.S. 479 (1985)—a decision that does *not* directly address the applicability of the *New York Times* "actual malice" standard to petitioning speech and, at most, "throw[s] a cross-light," *United States v. Aluminum Co.*, 148 F.2d 416, 429 (2d Cir. 1945) (L. Hand, J.), on that issue.

As a practical matter, the decision below—and the like decision of the Eighth Circuit—poses a threat to the proper workings of our "representative democracy," which, "to a very large extent, . . . depends upon the ability of the people to make their wishes known to their representatives." *Eastern RR Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

"In recent years, there has been a rising concern about the use of civil litigation, primarily defamation suits, to intimidate or silence those who speak out at public meetings . . . . Termed SLAPP suits—strategic lawsuits against public participation—such actions . . . are filed . . . to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future." *600 West 115th Street Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 603 N.E.2d 930, 933 n.1 (1992). *See* A. Lowe, *The Price of Speaking Out*, 82 A.B.A. J. 48 (1996). Based on data indicating that "Americans by the thousands are being sued, simply for exercising . . . the right to communicate [their] views to [their] government officials . . . on public issues," a University of Denver Political Litigation Project study concluded that the accelerating growth in the number of SLAPP lawsuits poses "a major threat to involved citizens." G. Pring & P. Canan, *SLAPPs; Getting Sued for Speaking Out* 1 & 3 (1996).

Decisions like the Michigan Supreme Court's decision here denying *New York Times* "actual malice" protection to

petitioning speech magnify that threat. For the *New York Times* "actual malice" standard serves to counter the chilling effect of such retaliatory litigation by reducing the risk of defamation liability and by facilitating the speedy disposition of defamation claims that do not meet that standard. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-256 (1986).

As we noted at the outset, Michigan Supreme Court Justice Young authored both the opinion denying *New York Times* "actual malice" protection to the petitioning speech here on the basis of that court's reading of *McDonald v. Smith* and a separate concurring opinion expressing his "hope" that this Court would clarify the law by "choos[ing] an alternative course to the one suggested by *McDonald*." Pet. App. 12a.

Justice Young's entreaty could not be more to the point. The time has come for the Court to resolve the conflict in the state courts and federal circuits created by the conflicting readings of this Court's *McDonald v. Smith* decision and to settle the important issue of the proper level of First Amendment protection against defamation claims for statements made in the course of petitioning the government.

1. By its decision in the instant case, the Michigan Supreme Court majority aligned itself with the Eighth Circuit *en banc* majority in *In re IBP Confidential Business Documents Litigation*, 797 F.2d 632 (8th Cir.)(*en banc*), *reh'g denied*, 800 F.2d 787 (8th Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987).

In re IBP involved a defamation claim by one Hughes Bagley—a former employee of Iowa Beef Processors, Inc. ("IBP")—based on the defendant IBP's letter to a Congressman stating that Bagley had lied in testifying before a House of Representatives subcommittee about IBP's pricing practices and that Bagley had stolen certain IBP documents

subpoenaed by the subcommittee in connection with his testimony. 797 F.2d at 638.

The *en banc* Eighth Circuit majority recognized that IBP's "activities with respect to the . . . letter are classic examples of petitioning activity entitled to some degree of first amendment protection." 797 F.2d at 640. And, in "identify[ing] the degree of protection to be accorded IBP's activities," the Eighth Circuit concluded that what "[f]low[s] from the Supreme Court's discussion in *McDonald*," *id.* at 642, is that where the defamation plaintiff "is a public official or a public figure, the *New York Times* actual malice standard will be applicable," but where the plaintiff "is found to be a private figure, the less formidable *Gertz* [negligence] standard . . . will be applicable," *id.* at 644 citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Finding that the *IBP* plaintiff was a private figure, the Eighth Circuit held that the defendant IBP was not protected by the *New York Times* "actual malice" standard. *Id.* at 647.

Judge Arnold, joined by Judges Bright, McMillian and Magill, dissented from the *IBP* majority's ruling and from the majority's reading of *McDonald*. As Judge Arnold read it, "*McDonald v. Smith*, 472 U.S. 479 (1985), establishes that *whenever* the right to petition is exercised, that right is afforded the protection of the actual malice standard; the nature of the communication and not the *status* of the defamation plaintiff is the touchstone." 800 F.2d at 789 (internal quotation marks omitted; emphasis in original).

2. In *Stevens v. Tillman*, 855 F.2d 394 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989), the Seventh Circuit aligned itself *with* Judge Arnold's reading of *McDonald v. Smith*—and his conclusion that petitioning speech is protected by the *New York Times* "actual malice" standard—and *against* the position of the Eighth Circuit *IBP* majority and the Michigan Supreme Court majority here. The Seventh

Circuit position accords with that of the Maryland Court of Appeals and the Washington Supreme Court. *See Miner v. Novotny*, 304 Md. 164, 498 A.2d 269 (1985); *Richmond v. Thompson*, 130 Wn.2d 368, 922 P.2d 1343 (1996).

Stevens v. Tillman involved defamation claims based in part on statements critical of a public school principal made at meetings of a board of education. The district court in that case "instruct[ed] the jury that only evidence satisfying the *New York Times* standard would permit an award of damages" and "did so on two grounds: that [the plaintiff] Stevens is a public official, and that the speakers were exercising their right to petition the government for redress of grievances." 855 F.2d at 403. The Seventh Circuit affirmed the district court's jury instruction on *both* grounds. *Id.*

On the second of these grounds—"that the speakers were exercising their right to petition the government"—the Seventh Circuit concluded that "[t]he statements made directly to the Board are governed by the *New York Times* standard under the holding of *McDonald v. Smith*, 472 U.S. 479 (1985)." 855 F.2d at 403. As the Seventh Circuit observed, an effort to "influence [the government] is classic political speech," and "[t]he first amendment prohibits efforts to ensure 'laboratory conditions' in politics." *Id.*[2]

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[2] *Eaton v. Newport Board of Education*, 975 F.2d 292 (6th Cir. 1992), and *Webster v. Sun Oil Co, Inc.*, 790 F.2d 157 (D.C. Cir. 1986), make the same point. In *Eaton*, the Sixth Circuit, in dismissing a former public school principal's claim for "the tort of outrageous conduct" arising out of the campaign that led to her termination, invoked the following passage from the Seventh Circuit's *Stevens* opinion: "statements made directly to the Board [of Education] are governed by the *New York Times* standard under the holding of *McDonald v. Smith*, 472 U.S. 479 (1985)." 975 F.2d at 299, quoting *Stevens v. Tillman*, 855 F.2d at 403. Likewise, in *Webster*, the District of Columbia Circuit read *McDonald* as holding "that the right to petition [i]s sufficiently protected by . . . a rule akin to the one imposed by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)." 790 F.2d at

3. The highest courts of two states have read *McDonald v. Smith*—as did the Seventh Circuit, the *IBP* dissenters and Michigan Supreme Court dissenters here—to *require* the application of the *New York Times* "actual malice" standard to *all* defamation claims arising out of petitioning activity.

In *Miner v. Novotny*, 304 Md. 164, 498 A.2d 269 (1985)—a defamation action over a statement in a formal complaint of police brutality made to the county sheriff's office—the Maryland Court of Appeals held:

> "In light of *McDonald*, the qualified privilege recognized in *New York Times* and its progeny constitutes the extent of the constitutionally-mandated protection of the First Amendment right to petition the government for redress of grievances." 498 A.2d at 272.

And, the Maryland court made clear that the *New York Times* "actual malice" standard applied as a "constitutionally-based privilege provided by the Petition Clause." *Id.* at 275. Indeed, the court did not even consider whether the plaintiff—a deputy sheriff—qualified as a "public official" under *Rosenblatt v. Baer*, 383 U.S. 75 (1966).

In *Richmond v. Thompson*, 130 Wn.2d 368, 922 P.2d 1343 (1996)—which arose in the same context as *Miner*—the Washington Supreme Court, citing *Miner*, agreed that "the proper standard under the petition clause must be the *New York Times* qualified privilege." 922 P.2d at 1349. The Washington court rested its application of the *New York Times* "actual malice" standard on *both* the status of the

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161. *See also Cardtoons, L.C. v. Major League Baseball Players Assoc.*, 208 F.3d 885, 901 & n. 14 (10th Cir. 2000)(*en banc*)(Lucero, Brorby & Briscoe, JJ., dissenting)("*McDonald* makes it clear that state libel actions arising from petitioning activity cannot proceed unless the elements of libel are consistent with the constitutionally-mandated actual malice standard.").

plaintiff as a "public official" *and* the petitioning nature of the speech at issue. *Id.* at 1348-1349.[3]

4. The Michigan Supreme Court majority took this Court's refusal in *McDonald v. Smith* to "elevate the Petition Clause to special First Amendment status," 472 U.S. at 485, to indicate "that the private-figure and public-figure dichotomy that applies to defamation claims involving the *Free Speech Clause and the Free Press Clause*, *Gertz*, [418 U.S.] at 342-347, also applies to defamation claims involving the Petition Clause," Pet. App. 9a (emphasis in original). This is a serious misreading of the *McDonald* opinion.

(a) In the first place, the Michigan Supreme Court majority's reading of *McDonald v. Smith* takes the case entirely out of its legal context.

McDonald reached this Court because of the following conflict among the lower courts over the protection against defamation claims granted by the Petition Clause:

> • Some courts had held that the Petition Clause provides *absolute* immunity against defamation claims based on statements made in petitioning the government. *See Sherrard v. Hull*, 53 Md. App. 553, 456 A.2d 59, 67, *aff'd per curiam*, 296 Md. 189, 460 A.2d 601 (1983)

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[3] In *Harris v. Adkins*, 189 W.Va. 465, 432 S.E.2d 549, 550 (1993), the West Virginia Supreme Court of Appeals considered the extent to which the Petition Clause in the West Virginia Constitution—which "afford[s] protection similar to that provided by the First Amendment to the United States Constitution"—shields from defamation liability statements about a city councilman made at a city council meeting. Stating its "agree[ment] with the reasoning in *McDonald*," the West Virginia high court concluded that "the right to petition the government found in Section 16 of Article III of the West Virginia Constitution[, which] is comparable to that found in the First Amendment to the United States Constitution[,] . . . does not provide an absolute privilege for intentional and reckless falsehoods, but the right is protected by the actual malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)." 432 S.E.2d at 552.

("while there is some authority for the proposition that the privilege should be qualified by a malice standard, . . . better reasoned cases hold the privilege to be absolute"); *Webb v. Fury*, 167 W.Va. 434, 282 S.E.2d 28, 34 (1981) ("even proof of malicious intent or knowing falsity would not defeat the First Amendment right to petition").

- Other courts had held that the Petition Clause provides only qualified immunity of the sort defined by the *New York Times* "actual malice" standard. *See McDonald v. Smith*, 562 F.Supp. 829, 841-842 (M.D.N.C. 1983), *aff'd*, 737 F.2d 427, 428-429 (4th Cir. 1984) ("right to petition" requires application of the *New York Times* "actual malice" standard); *Bradley v. Computer Sciences Corp.*, 643 F.2d 1029, 1033 (4th Cir.), *cert. denied*, 454 U.S. 940 (1981)("letter is not scurrilous, anonymous, or full of unfounded charges"); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1345 (7th Cir.), *cert. denied*, 434 U.S. 975 (1977) ("a state's interest in protecting its citizens from common law torts justifies overriding these First Amendment considerations when knowing falsity is alleged").

In contrast—and of the most critical significance—*no* court had held that the Petition Clause provides anything *less* than *New York Times* immunity. *See Sherrard*, 456 A.2d at 68-69 (reviewing the "split of authority" over "whether the petitioning privilege should be absolute or qualified").

In this Court, the *McDonald* defendant argued for absolute immunity under the Petition Clause and against the Fourth Circuit's ruling that under the Petition Clause "damages may be recovered only if petitioner is shown to have acted with malice," i.e., "'malice' . . . defined . . . in terms . . . consistent with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)." 472 U.S. at 485. The *McDonald* Court responded by rejecting that challenge to the Fourth Circuit's position and by ruling "that the Petition Clause does not require the . . .

expan[sion of] th[e *New York Times*] privilege into an absolute one." *Id.* This Court did not, however, go further and adopt the view—embraced by *no* court at that time—that the Petition Clause provides something less than the qualified immunity defined in *New York Times*.

Indeed, the *McDonald* Court described *White v. Nicholls*, 44 U.S. (3 How.) 266 (1845), and *Garrison v. Louisiana*, 379 U.S. 64 (1964)—the two cases on which the Court relied in holding that the Petition Clause does not provide absolute immunity—as applying standards similar to the *New York Times* standard.[4] Thus, as the Michigan Supreme Court dissenters point out, the *McDonald* Court proceeded on the assumption that the choice before it was between, on the one hand, "absolute immunity," and, on the other hand, qualified immunity as provided by "the actual-malice standard." Pet. App. 32a-33a.

In the end, the *McDonald* Court emphasized that under its ruling, "[t]he right to petition *is* guaranteed," while "the right to commit libel *with impunity* is not." 472 U.S. at 485 (emphasis added). Underscoring this point, Justice Brennan's concurring opinion added "that expression falling within the scope of the Petition Clause, while fully protected by the actual-malice standard set forth in *New York Times Co. v. Sullivan*, is not shielded by an absolute privilege." *Id.* at 490.

(b) Equally to the point, the Michigan Supreme Court's reading of *McDonald v. Smith* puts that decision at cross-purposes with this Court's Petition Clause jurisprudence.

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[4] The *McDonald* Court described *White* as holding that "petitions to the Government" are "actionable if prompted by 'express malice,' which was defined as 'falsehood and the absence of probable cause.'" 472 U.S. at 484, quoting *White*, 44 U.S. at 291. And, the *McDonald* Court described *Garrison* as holding that "petitions to the President that contain intentional and reckless falsehoods 'do not enjoy constitutional protection.'" 472 U.S. at 484, quoting *Garrison*, 379 U.S. at 75.

The Court has repeatedly "recognized [that the] right to petition [i]s one of 'the most precious of the liberties safeguarded by the Bill of Rights,' *Mine Workers v. Illinois Bar Assn*, 389 U.S. 217, 222 (1967), and ha[s] explained that the right is implied by '[t]he very idea of a government, republican in form,' *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)." *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 524-525 (2002).

Given the central role of petitioning in our representative form of government, the Court has taken care to accord the right to petition a wide measure of "'breathing space' protection." *BE&K Construction*, 536 U.S. at 531, citing *New York Times*, 376 U.S. at 279. The Court has, for example, provided broad Petition Clause immunity from anti-trust claims in a line of seven decisions running from *Eastern RR Presidents Conference v. Noerr Motor Freight, supra*, to *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993). As Judge Easterbrook recognized in *Stevens v. Tillman*, the lesson is that speech to "influence the [government] is classic political speech," and "in politics[,] speech rather than damages is the right response to distorted presentations and overblown rhetoric." 855 F.2d at 403.

Against that background, "[i]n the balance to be struck between the State's interest in protecting its citizens from reputational injury and the Constitution's requirement that the State not unduly burden its citizens seeking to participate in the fundamental processes of governance, the scale is not even." *600 West 115th Street Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 603 N.E.2d 930, 934 (1992). To the contrary, the balance is inclined toward those who participate in that process by addressing government representatives.

Because "[t]he public has an interest in ensuring that only competent, reliable and responsible contractors receive public work," for example, "it is the right of every citizen to

communicate with his or her government and its officers on matters that affect the discharge of their duties in this regard." *A & B Abell Elevator Co. v. Columbus/Central Ohio Building & Construction Trades Council*, 73 Ohio St. 3d 1, 651 N.E. 2d 1283, 1291 (1995). That being so, it follows, in Judge Arnold's words, that "*whenever* the right to petition is exercised, that right is afforded the protection of the actual malice standard; the nature of the communication [as petitioning speech] and not the *status* of the defamation plaintiff is the touchstone." *In re IBP*, 800 F.2d at 789 (internal quotation marks omitted; emphasis in original).

It follows, too, that the *Gertz* negligence standard is inappropriate in the petitioning context. As Justice Powell has explained, *Gertz* accords a lower level of immunity to statements broadcast to the general public about private figures "[l]argely because private persons have not voluntarily exposed themselves to increased risk of injury from defamatory statements and because they generally lack effective opportunities for rebutting such statements." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756 (1985) (opinion of Powell, J.).

Neither of those points holds with respect to petitioning speech addressed to government representatives critical of a person who performs a public function or who seeks to perform a public function.

In the first place, while private persons have not invited the general public's attention to their actions or capacities, a person who, for example, "seek[s] the fruits of a taxpayer-funded construction project," Pet. App. 28a n. 11, "invites public attention to the quality and efficiency of his or her work," *Kahn v. Bower*, 232 Cal. App. 3d 1599, 1614, 284 Cal. Rptr. 244, 254 (1991), and invites statements concerning these matters to the appropriate government representatives.

Moreover, while a private person has no means of responding to statements broadcast to the general public, that is not true of petitioning speech addressed to government representatives. Where, as here, the government representatives are holding a public hearing, "[t]he [allegedly] defamed, in the same setting and with the same audience, has the immediate opportunity to air his competing view." *600 West 115th Street Corp. v. Von Gutfeld*, 603 N.E.2d at 934. And, as Justice Young noted in his concurring opinion below, "the Petition Clause itself protect[s] [the allegedly defamed] plaintiff's right to deliver a written petition to the [government] in order to answer the defamatory statements made by the defendant." Pet. App. 29a. Moreover, where the petition takes the form of a charge or complaint, "'the protective machinery of due process'"—required in many situations where the government takes adverse action against a party—provides an "effective means of rebutting the lie, correcting the error, and minimizing the adverse impact on [the plaintiff's] reputation." *Kahn v. Bower*, 232 Cal. App. 3d at 1614, 284 Cal. Rptr. at 253, quoting *Stern v. United States Gypsum*, 547 F.2d at 1344.

* * *

McDonald v. Smith is the only decision in which this Court has addressed the nature and extent of the Petition Clause protection against defamation claims. The opinions below and the conflict in the state and federal appellate courts show that "the scope of *McDonald* is open to considerable doubt." *Baker v. Charles*, 919 F.Supp. 41, 43 (D. Me. 1996). And, on the Michigan Supreme Court's reading of *McDonald*, "the extent of First Amendment . . . protection for a private citizen who petitions a state administrative agency on a subject within its jurisdiction" is "[s]urprisingly" narrow. *Baker v. Charles*, 919 F.Supp. at 42.

This kind of "[u]ncertainty as to the scope of the constitutional protection can only dissuade protected speech,"

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 685 (1989), and encourage retaliatory "SLAPP" lawsuits.

The Court should resolve the uncertainty created by the division among the lower courts over the extent of First Amendment protection against defamation claims brought in retaliation for statements made by citizens to their governments.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF MICHIGAN

No. 119357

J & J CONSTRUCTION CO.,
Plaintiff-Appellant,

v.

BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 1
and MARK KING, jointly and severally,
Defendants-Appellees.

November 21, 2002, Argued
July 9, 2003, Decided
July 9, 2003, Filed

OPINION: BEFORE THE ENTIRE BENCH

YOUNG, J.

Plaintiff appeals the judgment of the Court of Appeals regarding several issues involving the Petition Clause of the *First Amendment*. We reverse that judgment and reinstate the judgment of the trial court.

I. Facts and Procedural History

Plaintiff, a construction company, submitted a bid to perform a masonry contract for the city of Wayne. Plaintiff was the low bidder for the contract. Pursuant to the Wayne City Charter, the city council was obligated to award the contract to the lowest qualified bidder unless it determined

that the public interest would be better served by accepting a higher bid. Wayne City Charter, § 13.1(d).[1]

Defendant Mark King,[2] a Bricklayers & Allied Craftsmen Union field representative with fifteen years experience as a mason, discovered that plaintiff, a nonunion employer, was the low bidder for the masonry contract. He thereafter set out to dissuade the city council from awarding the contract to plaintiff. In this effort, defendant presented privately to the city manager, and to the city council in public session, deceptive photographs of plaintiff's masonry work that suggested plaintiff's workmanship was of poor quality. He also represented that plaintiff might not be able to perform the contract in a timely manner. After plaintiff attempted to respond to these allegations during the public meeting of the council, defendant made reference to the fact that plaintiff was a nonunion contractor that did not pay the prevailing wage to its employees.

Because of its concerns regarding the allegations defendant made against plaintiff, the city council referred plaintiff's bid to the city administration for further review. Following that review, the city council awarded the masonry contract to the second lowest bidder, stating in its resolution that "the Council had concerns as to the low bidder because of claims made about faulty workmanship and because of concerns

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[1] Section 13.1(d) specifically provides:

> Purchases shall be made from the lowest qualified bidder meeting specifications, unless the Council shall determine that the public interest will be better served by accepting a higher bid, sales shall be made to the bidder whose bid is most advantageous to the City. In any case where a bid, other than the lowest, is accepted, the Council shall set forth its reasons therefor in its resolution accepting such bid.

[2] Because the trial court found that King was acting in his capacity as a union representative and thus on behalf of the defendant union during the events at issue, we will refer to both defendants in the singular.

about noncompliance with the payment of prevailing wages and fringe benefits . . . ."

Having lost the contract bid, plaintiff filed a complaint against defendant for defamation and tortious interference with business expectations. Applying an ordinary negligence standard, the trial court found that defendant's statements regarding the quality of plaintiff's workmanship and plaintiff's prospective ability to complete the job on time were false and defamatory, but that plaintiff failed to meet its burden of proving that defendant's prevailing wage statements were false. Regarding the defamation claim, the trial court rejected defendant's argument that a qualified privilege existed because the statements were made while petitioning the government, reasoning that the qualified privilege "actual malice" standard was inapplicable because plaintiff was a private, not a public, figure. Having found defendant's statements regarding plaintiff's workmanship and prospective ability to timely complete the project to be false, defamatory, and unprivileged, the trial court held defendant liable for defamation under *MCL 600.2911(7)*.[3]

In addition, the trial court concluded that the defamation formed the foundation for tortious interference with business expectations. The court declined to protect defendant from liability from this claim on the basis of the principles of the *Noerr-Pennington* doctrine,[4] which protect petitioning

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[3] *MCL 600.2911(7)* provides:

> An action for libel or slander shall not be brought based upon a communication involving a private individual unless the defamatory falsehood concerns the private individual and was published negligently. Recovery under this provision shall be limited to economic damages including attorney fees.

[4] The Noerr-Pennington doctrine is derived from two United States Supreme Court cases pertaining to the Petition Clause and antitrust laws: *Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc*, 365 U.S. 127; 81 S. Ct. 523; 5 L. Ed. 2d 464 (1961), and *United Mine Workers*

activity from antitrust violations when the petition concerns legislative or regulatory issues. The court concluded that defendant's statements were not made in an attempt to urge legislative or regulatory policy decisions. In essence, the trial court applied what the Court of Appeals and the parties have termed a "market participant" exception to the *Noerr-Pennington* doctrine.[5]

The trial court awarded plaintiff damages of $ 57,888, the loss of expected profits under the contract for both the claim of defamation and the claim of tortious interference with business expectations. Attorney fees of $ 104,286.95 and interest of $ 26,044.51 were also awarded to plaintiff.

Defendant appealed, and the Court of Appeals affirmed in part,[6] reversed in part, and remanded for further proceedings. The Court of Appeals concluded that where petitioning activity is involved, the "actual malice" standard for defameation claims established in *New York Times Co v Sullivan*,

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of America v Pennington, 381 U.S. 657; 85 S. Ct. 1585; 14 L. Ed. 2d 626 (1965).

[5] The "market participant" exception to the *Noerr-Pennington* doctrine, adopted in some jurisdictions, but rejected in others, generally provides that a petitioner is not insulated from liability for defamation while petitioning the government where the governmental entity is acting as a market participant, as opposed to making policy. 245 Mich. App. 722, 733-734; 631 N.W.2d 42 (2001), citing *George R Whitten, Jr, Inc v Paddock Pool Builders, Inc*, 424 F.2d 25 (CA 1, 1970) (adopting an exception to *Noerr-Pennington* where the government is performing a proprietary function); *Greenwood Utilities Comm v. Mississippi Power Co*, 751 F.2d 1484, 1505 n 14 (CA 5, 1985) (expressly rejecting *Whitten*).

[6] The trial court also rejected defendant's argument that plaintiff's claims are preempted by the National Labor Relations Act, 29 USC 151 *et seq*. The Court of Appeals affirmed the trial court's decision regarding this federal preemption issue. Defendant has not cross-appealed on this issue or moved to have it added as an issue of dispute before this Court. Accordingly, we will not address that portion of the judgment of the Court of Appeals.

376 U.S. 254; 84 S. Ct. 710; 11 L. Ed. 2d 686 (1964), applies regardless whether plaintiff is a private or public figure. Because the trial court only issued a finding that defendant's defamatory statements were negligent, the Court of Appeals remanded the case to the trial court for a determination whether defendant's conduct constituted "actual malice."

Regarding the claim of tortious interference with business expectations, the Court of Appeals held that "'the *Noerr-Pennington* doctrine is a principle of constitutional law that bars litigation arising from injuries received as a consequence of *First Amendment* petitioning activity, regardless of the underlying cause of action asserted by the plaintiffs.'" 245 Mich. App. 730, quoting *Azzar v Primebank, FSB*, 198 Mich. App. 512, 517; 499 N.W.2d 793 (1993). Relying on *Azzar*, the Court of Appeals concluded that defamation is actionable on the basis of petition activity only where the petitioning was actually a "sham." Further, the panel reversed the trial court's application of the "market participant" exception to the *Noerr-Pennington* doctrine, writing that "it is not obvious why different rights, duties, or immunities should apply when one is lobbying for political action in the form of outright commercial patronage, as opposed to legislation or enforcement actions." 245 Mich. App. 736.

We granted leave to appeal. 466 Mich. 859 (2002).

II. Standard of Review

Plaintiff's appeal raises three issues of federal constitutional law [7] regarding the *Petition Clause*: first, whether a

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[7] Const 1963, art I, § 3 provides that "the people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances." However, the parties have neither rested their arguments on this state constitutional right nor suggested that this provision is interpreted any differently from the Petition Clause of the *First Amendment*. Accordingly, our consideration is limited to the federal constitutional issues presented.

private-figure plaintiff must prove "actual malice" in a defamation claim against a defendant whose contested statements were made while petitioning the government; second, considering the *Noerr-Pennington* doctrine, whether a cause of action exists for tortious interference with business expectations as the result of statements made by a defendant while petitioning the government; and third, whether there exists a "market participant" exception to the *Noerr-Pennington* doctrine.

The protections provided by the *First Amendment*, including the Petition Clause, have been extended to the states by the *Fourteenth Amendment*. *Whitehill v Elkins*, 389 U.S. 54, 57; 88 S. Ct. 184; 19 L. Ed. 2d 228 (1967). We review de novo issues of constitutional law. *McDougall v Schanz*, 461 Mich. 15, 24; 597 N.W.2d 148 (1999).

III. Discussion

A. Defamation

The first issue presented is whether the private-figure and public-figure dichotomy embodied in defamation case law on freedom of speech and freedom of the press from the United States Supreme Court extends to defamation involving the right to petition. The United States Supreme Court has never been squarely presented with, or decided, this question.[8]

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[8] While in this opinion we conclude that *McDonald v Smith*, 472 U.S. 479; 105 S. Ct. 2787; 86 L. Ed. 2d 384 (1985), provides sufficient guidance to resolve the pending issues, we believe the Supreme Court has never directly addressed whether the private-figure and public-figure doctrine of free speech and free press defamation law announced in *Gertz v Robert Welch, Inc*, 418 U.S. 323; 94 S. Ct. 2997; 41 L. Ed. 2d 789 (1974), discussed below, applies in a petition case.

The Court had no cause to discuss the *Gertz* doctrine in *McDonald*, inasmuch as the *McDonald* plaintiff was a public figure and, thus, defendant was constitutionally entitled to the qualified immunity "actual malice" standard of *New York Times*, as a result of the *McDonald* Court

However, we are guided by the general *Petition Clause* defamation concepts announced in *McDonald v Smith*, 472 U.S. 479; 105 S. Ct. 2787; 86 L. Ed. 2d 384 (1985). In rejecting an argument that absolute immunity attaches to the right to petition, the *McDonald* Court wrote:

> To accept petitioner's claim of absolute immunity would elevate the *Petition Clause* to special *First Amendment* status. The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. *These First Amendment rights are inseparable and there is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment expressions.* [*McDonald, supra at 485* (internal citations omitted; emphasis added).]

By this reasoning, at least regarding the constitutional law of defamation immunity, the Court has made clear that it considers the *Petition Clause* as offering no greater protection than that of the *Free Speech Clause and the Free Press Clause. In* so concluding, we believe the Court has strongly signaled its view that all the *Free Speech Clause and Free Press Clause* defamation doctrine developed in the past forty years is to be imported without change to constitutional adjudications arising under the *Petition Clause*.[9] Accordingly,

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holding that the *Petition Clause* provided no greater defamation protection than the *Free Speech Clause and the Free Press Clause*. In addition, under the state common law of North Carolina, which was at issue in *McDonald*, "actual malice" was the governing standard for both private-figure and public-figure defamation actions. As a result, the fact pattern in *McDonald* did not invite or require a discussion of the private-figure and public-figure dichotomy.

[9] In interpreting the *federal* constitution, state courts are not privileged to provide greater protections or restrictions when the Supreme Court of the United States has refrained from doing so. *Arkansas v Sullivan*, 532 U.S. 769, 772; 121 S. Ct. 1876; 149 L. Ed. 2d 994 (2001).

an analysis of relevant United States Supreme Court case law on free speech and free press defamation is essential. *Prŏduction Steel Strip Corp v Detroit*, 390 Mich. 508, 514; 213 N.W.2d 419 (1973).

Under long-settled constitutional principles concerning the *First Amendment* rights of freedom of speech and freedom of the press, a *public*-figure plaintiff must establish that a defendant made defamatory statements with "actual malice" in order to prevail in a defamation action. *New York Times, supra* (establishing the "actual malice" standard for liability for defamation of public officials); *Curtis Publishing Co v Butts*, 388 U.S. 130; 87 S. Ct. 1975; 18 L. Ed. 2d 1094 (1967) (extending the "actual malice" standard to public figures). "Actual malice" exists when the defendant knowingly makes a false statement or makes a false statement in reckless disregard of the truth. *New York Times, supra* at 280. In other words, a defamation defendant is entitled to a qualified privilege in the form of a heightened "actual malice" standard required to be met by a public-figure plaintiff.

In contrast, a defamation defendant whose alleged defamatory statements pertained to a *private* figure receives no such constitutional protection under case law on freedom of speech and freedom of the press. Rather, the states are left to decide for themselves whether a private-figure plaintiff must establish more than ordinary negligence as a predicate for recovery for defamation. *Gertz v Robert Welch, Inc*, 418 US 323, 346-348; 94 S. Ct. 2997; 41 L. Ed. 2d 789 (1974).[10] In

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[10] *Gertz* specifically held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.* at 347. Accordingly, defamation against a private figure still requires that fault be established. In addition, private-figure plaintiffs may only recover actual damages under a negligence standard for defamation. In order to recover any presumed or punitive damages, *Gertz* requires proof of actual malice. *Id.* at 350.

Rouch v Enquirer & News of Battle Creek, 427 Mich. 157; 398 N.W.2d 245 (1986), this Court held that a defamation defendant is not entitled to a qualified privilege in a case involving a private-figure plaintiff under Michigan law, and thus declined to extend greater protection than constitutionally required under *Gertz*.[11] More important, the Michigan Legislature codified the *Rouch* holding in 1988, statutorily providing that defamation of a private figure requires only a showing of negligence, not actual malice. *MCL 600.2911(7)*.[12]

Because the United States Supreme Court has concluded that the right to petition should be accorded no greater protection than the rights to free speech and free press, *McDonald, supra* at 485, we conclude that the private-figure and public-figure dichotomy that applies to defamation claims involving the *Free Speech Clause and the Free Press Clause*, *Gertz, supra* at 342-347, also applies to defamation claims involving the Petition Clause. Accordingly, we reverse the judgment of the Court of Appeals that the "actual malice" qualified immunity standard of *New York Times* applies in *Petition Clause* defamation cases regardless whether the plaintiff is a private or public figure. Extending *Gertz* in the manner suggested by *McDonald*, a defamation defendant whose statements about a private figure are made while petitioning the government is not constitutionally entitled to a qualified immunity in the form of the heightened "actual malice" standard. Because *MCL 600.2911(7)* provides no

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[11] Where the alleged defamation concerns both a private figure and a matter of private concern, the burden of proving that the statement was not false rests with the defendant. However, where the statements are of public concern, the private-figure plaintiff bears the burden of proving falsity. *Rouch, supra* at 181, citing *Philadelphia Newspapers, Inc v Hepps*, 475 U.S. 767; 106 S. Ct. 1558; 89 L. Ed. 2d 783 (1986). In this case, plaintiff proved falsity at trial.

[12] See n 3.

greater protection for such defendants, the Court of Appeals erred. The trial court's decision concerning plaintiff's defamation claim is reinstated.

B. Tortious Interference With Business Expectations

Although we maintain reservations about the judgment of the Court of Appeals regarding the claim of tortious interference with business expectations, concerning the *Noerr-Pennington* doctrine and any "market participant" exception to that doctrine, we need not review those issues here.

The trial court awarded damages for lost business profits under alternative theories of defamation and tortious interference with business expectations based on defamation. Attorneys fees were awarded pursuant to *MCL 600.2911(7)*, which pertains to defamation actions. In light of our reversal of the judgment of the Court of Appeals regarding defamation and the resulting reinstatement of the trial court's decision on that claim, the full judgment amount awarded by the trial court to plaintiff is restored.

Accordingly, our disposition of the remaining federal constitutional issues raised by the parties and decided by the Court of Appeals will not alter the ultimate resolution of this case. This Court will not unnecessarily decide constitutional issues, *People v Riley*, 465 Mich. 442, 447; 636 N.W.2d 514 (2001), and it is an undisputed principle of judicial review that questions of constitutionality should not be decided if the case may be disposed of on other grounds. *MacLean v Michigan State Bd of Control for Vocational Ed*, 294 Mich. 45, 50; 292 NW 662 (1940).

For these reasons, we decline to address the federal constitutional issues presented concerning the *Noerr-Pennington* doctrine and the suggested "market participant" exception to that doctrine. Although we question the analysis of the Court of Appeals regarding those issues, our resolution of the case makes it unnecessary for us to address them.

Conclusion

The Court of Appeals incorrectly concluded that the private-figure and public-figure dichotomy present in freedom of speech and freedom of the press case law is inapplicable to defamation claims involving the right to petition. In *McDonald, supra* at 485, the United States Supreme Court stated that "there is no sound basis for granting greater constitutional protection to statements made in a petition . . . than other *First Amendment* expressions." Accordingly, it is clear that the constitutional rules regarding defamation claims involving the *Free Speech Clause and the Free Press Clause* are applicable to defamation claims involving the *Petition Clause*.

The private-figure and public-figure dichotomy being one of the constitutional rules, we hold that private-figure defamation plaintiffs are only constitutionally required to prove ordinary negligence in order to establish defamation in cases involving the right to petition. No qualified immunity is constitutionally provided to defamation defendants whose statements about private figures are made while petitioning the government. Because *MCL 600.2911(7)* does not provide greater protection for defamation defendants than constitutionally required, ordinary negligence is the standard required to be met by private-figure defamation plaintiffs in cases involving the *Petition Clause*.

For these reasons, we reverse and vacate the judgment of the Court of Appeals and reinstate the judgment of the trial court.

Robert P. Young, Jr.
Maura D. Corrigan
Elizabeth A. Weaver
Clifford W. Taylor
Stephen J. Markman

CONCUR: YOUNG, J. (*concurring*).

Given that we are constrained to follow our best understanding of the United States Supreme Court's direction concerning the *Petition Clause*, I write separately to suggest that a proper application of the rules of constitutional interpretation produces a result contrary to that reached in *McDonald v Smith*, 472 U.S. 479; 105 S. Ct. 2787; 86 L. Ed. 2d 384 (1985). I believe that, under an originalist interpretation of the Petition Clause, the defendant union and union representative would enjoy an absolute immunity from plaintiff's suit for their petitioning activity. Should the Supreme Court of the United States seek to revisit its Petition Clause jurisprudence, there is significant, persuasive historical evidence suggesting that the contemporary understanding of the Petition Clause as announced in *McDonald* is incompatible with the original understanding of the Petition Clause.

If our majority has correctly determined that *McDonald* stands for the proposition that, at least concerning defamation immunity, the sibling clauses of the *First Amendment* have no distinctive meaning under our Constitution, I believe *McDonald* was incorrectly decided. Further, an attempt to import constitutional law on defamation involving free speech and free press to situations involving the right to petition raises questions about the soundness of such a principle, as exemplified by our application of the private-figure and public-figure dichotomy to the present case.

Accordingly, by laying out the historical record supporting a conclusion based on an originalist understanding of the Petition Clause, it is my hope that the United States Supreme Court may choose an alternative course to the one suggested by *McDonald*.

I. The Petition Clause

A. The Rules of Constitutional Interpretation

In interpreting a constitution, the primary objective is to discern the original intent of the constitutional text. See, e.g., *Utah v Evans*, 536 U.S. 452, 491; 122 S. Ct. 2191; 153 L. Ed. 2d 453 (2002) (Thomas, J., concurring in part and dissenting in part, joined by Kennedy, J.); *McIntyre v Ohio Elections Comm*, 514 U.S. 334, 359; 115 S. Ct. 1511; 131 L. Ed. 2d 426 (1995) (Thomas, J., concurring in judgment, quoting *South Carolina v United States*, 199 U.S. 437, 448; 26 S. Ct. 110; 50 L. Ed. 261 [1905]); *Michigan United Conservation Clubs v Secretary of State*, 464 Mich. 359, 373; 630 N.W.2d 297 (2001) (YOUNG, J., concurring); *People v DeJonge*, 442 Mich. 266, 274-275; 501 N.W.2d 127 (1993). See also, 1 Story, Commentaries on the Constitution of the United States (4th ed, 1873), § 426, p 315 (Justice Story stated that the Constitution must "have a fixed, uniform, permanent, construction . . . not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and forever"); Bork, *The Tempting of America* (New York: The Free Press, 1990), ch 7, pp 143-160; Scalia, *A Matter of Interpretation* (Princeton, NJ: Princeton University Press, 1997), pp 37-47. Further, the rights created under the Bill of Rights must be preserved as they existed in 1791. *McIntyre, supra* at 371-372 (Scalia, J., dissenting, joined by Rehnquist, C.J.) (stating that the traditional view held by the Court and society is that the Constitution's original meaning is unchanging); *Curtis v Loether*, 415 U.S. 189, 193; 94 S. Ct. 1005; 39 L. Ed. 2d 260 (1974) (a common-law action that becomes statutory is nonetheless protected by the *Seventh Amendment*'s right to trial by jury); Story, *supra*. This principle of interpretation follows inexorably from the fact that the People provided an explicit method and means for amending the Constitution. *US Const, art V*.

The questions presented in this case concern the meaning of the Petition Clause of the *First Amendment*. Accordingly, a thorough analysis of both the history of the [**23] practice of petitioning the government before its codification in 1791 as a part of the *First Amendment* and the common understanding of the text of the Petition Clause at that time is in order.

B. The Original Understanding of the Petition Clause

1. The Pre-1791 History of the Petition Right

The right to petition has historical roots in Anglo-American constitutional history dating back to 1013. Smith, *"Shall make no law abridging . . .": An analysis of the neglected, but nearly absolute, right of petition*, 54 U Cin L R 1153, 1154-1155 (1986) (discussing English nobles' petition to Aethelred the Unready in 1013). Even before democracy was practiced in Great Britain, petitioning was recognized as a right granted by the royal sovereign to his subjects, as evidenced in the Magna Carta of 1215. *Id.* at 1155. Developing through the centuries, "petitioning reached enormous popularity" during the era of the Civil War and Interregnum in England. *Id.* at 1157. In fact, James I expressly provided "the Right of his subjects to make their immediate Addresses to him by Petition." *Id.*, quoting 5 Parl Hist Eng App ccxiv (1701) (Proclamation 10 July, 19 Jac). Charles I followed suit and it is documented as late as 1644 that he invited petitioning and promised that such petitioning would be heard. *Id.*

In the case of *Lake v King*, 1 Wms Saund 131, 85 Eng Rep 137 (1668), whether a defamation action could lie where the alleged defamatory statements were made while petitioning Parliament was at issue.[1] In *Lake*, as in the present case, the

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[1] Although I realize that the Supreme Court in *White v Nicholls*, 44 U.S. (3 How) 266, 289; 11 L. Ed. 591 (1845), labeled *Lake* "anomalous" and inconsistent with "modern adjudications," I note that constitutional

libel at issue was civil in nature. Defendant King's petition to Parliament allegedly defamed plaintiff Lake, yet it was held that because the defendant was petitioning Parliament, his statements were immune from liability. Thus, *Lake* established that absolute immunity from defamation actions attaches to a petition, regardless whether the petition contains libelous statements. *Id.*

If there were any question that petitioners in England were protected from defamation liability following *Lake*, *The Case of the Seven Bishops*, 12 Howell's State Trials 183 (1688), and the monumental pivot in English constitutional history that immediately followed *Seven Bishops* appear to have resolved the matter. In April 1688, James II decreed that all churches read a declaration, "Liberty of Conscience," at divine services, which directive many bishops and clergy refused to follow. After seven bishops petitioned to be relieved from the King's mandate, they were prosecuted for seditious libel. Smith, *supra* at 1160-1161.

A central inquiry in *Seven Bishops* was whether the defendants were "petitioning" the King. *Seven Bishops, supra* at 320-321. Defense counsel advanced that the King's indicting document—the information—was insufficient inasmuch as it presented the bishops' allegedly libelous statements in an excerpted fashion, separated from the petition as a whole. The King's prosecutors argued that the defamatory

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interpretation inquiries are directed at the *original understanding* of a provision. Accordingly, that *Lake* proved to be inconsistent with post-1791 adjudications should be of no consequence where there is no record of *Lake*'s vitality being questioned before 1791. Nor does the absence of any pre-1791 challenge to *Lake* warrant that its rule of law be considered "anomalous." This is particularly evident where subsequent events can be relied on as an indication that *Lake* was considered sound. See the discussion below regarding *The Case of the Seven Bishops*, 12 Howell's State Trials 183 (1688), and the establishment of the English Bill of Rights.

statements were delivered in the pretense of a petition and thus only the libelous paragraphs were germane. The resolution of this question was dispositive because unpopular political speech and press were prosecuted as seditious libel during this period in English history. Smith, *supra* at 1180. Accordingly, if the bishops' statement was not properly communicated pursuant to the recognized petition right, namely, in a *petition*, the bishops were not immune and could have been rightly prosecuted for seditious libel. Following a lengthy discourse, the entire petition was permitted to be introduced into evidence and provided to the jury for its deliberations. The jury returned a verdict of not guilty. *Id.* at 1161.

Notwithstanding the verdict in *Seven Bishops*, James II appealed to the army to enforce his Liberty of Conscience decree. In response to the King's appeal, much of the army declined, laying down their arms. Thereafter,

> [a] convention of the peers and representatives of the realm resolved on January 28-29, 1689, that James II had broken the "original contract between King and people." The crown was offered to William and Mary upon the condition that they accept the Declaration of Rights; acceptance was given on February 13, 1689. The Declaration of Rights provided "that *it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning is illegal.*" [Smith, *supra* at 1162 (emphasis added).]

The adoption of this petition right in the English Bill of Rights evinces a clear understanding that the rule of *Lake*, that petitions to Parliament may not be the subject of defamation actions, was also the rule concerning petitions to the king. As the English codified petition right provided in 1689, it is the "right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal." Schnapper, *"Libelous" petitions for redress of griev-*

ances-Bad historiography makes worse law, 74 Iowa L R 303, 315 (1989), quoting *An Act declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown* (The Declaration of Rights), 1 W & M, sess 2, ch 2 (1688-1689), 9 Statutes at Large 67, 69 (Pickering 1764). That the people of England intended their petitions to be immune from all penalty seems unquestionable in light of the textual language of the 1689 Declaration of Rights, particularity given the English people's awareness of the *Seven Bishops* case and the historical events it prompted.[2]

Thus, *Lake*, the dispositive inquiry in *Seven Bishops* regarding whether the defendants' speech was in petition form, and the historical effect of *Seven Bishops* are instructive about the scope and meaning of the petition right before 1791. First, they crystalize the common-law understanding in late seventeenth-century England that speech was absolutely immune when made in petition form. Second, the historical role that *Seven Bishops* had in inducing the creation of the English Bill of Rights (Declaration of Rights) and the explicit inclusion of the right to petition in the English Bill of Rights immediately following the *Seven Bishops* decision reinforce the foundational understanding of the importance and full scope of the right to petition. Finally, the elementary distinctions maintained between the freedoms of speech and press and the right to petition in the seventeenth century is evident in *Lake* and *Seven Bishops*, where the outcomes were influenced by whether the defendants' statements were made while petitioning because the same subject matter spoken outside the petitioning activity was not protected. *Smith*, *supra* at 1177, 1180.

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[2] Defense counsel in *Seven Bishops* proclaimed to the Court that the dispute was "a case of the greatest consequence that ever was in Westminster-hall . . . or in this court." *Seven Bishops*, *supra* at 239.

"The American colonies adopted and adapted the right to petition from petition's English precursors." Mark, *The vestigal constitution: The history and significance of the right to petition*, 66 Fordham L R 2153, 2161 (1998). "In no case did the colonial affirmation of the right narrow the English right." *Id.* at 2175. Indeed, our Declaration of Independence is the most famous example of the colonists' commonplace use of petitioning as a recognized political right:

> We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.

Following the drafting of the Constitution in 1787 and its ratification in 1789, it became clear that the Anti-Federalists would demand amendments to the Constitution to assure the continued protection of the well-understood natural rights that a self-governing people do not forfeit to their government. *Mark*, *supra* at 2207. Regarding consideration of the petition right, what arose was a focus on the role of the petition right in the new national governmental experiment and, more directly, an exhaustive dialogue regarding whether any petitioning should be accompanied by the power to *instruct* the people's representatives. Instruction was ultimately rejected.

No discussion is recorded that challenged the protective scope of the petition right recognized under English law and practiced in the colonies, including the protection from defamation under the case law of *Seven Bishops* and *Lake*. *Schnapper*, *supra* at 345 (1989) (stating that "there is absolutely no contemporaneous history suggesting that anyone connected with the framing and approval of the petition clause harbored any objection to or intended any limitation on the right to petition as it had existed under English law prior to the Revolution and as it continued in the several states."). Accordingly, the lack of any discussion regarding limiting the petition right as it was understood at that time undoubtedly suggests that the Petition Clause that

was ratified as a part of the *First Amendment, in 1791*, embodied the same petition right present in the English Bill of Rights and freely practiced in colonial America.

In fact, even codified qualifications on the petition right found in several colonial and early state declarations of rights were not included in the *First Amendment* Petition Clause.[3] *Smith, supra* at 1181-1182. Without textual references in the Petition Clause itself suggesting otherwise, and the rejection in the adopted Petition Clause of any of the minor qualifications that were prescribed by individual colonies and states, the compelling conclusion is that the *First Amendment* drafters and ratifiers intended the broad petition protection that had been recognized in England and practiced in the colonies.

This conclusion is fortified by the contentious debate that occurred regarding the lack of a Bill of Rights in the original Constitution. Bowen, *Miracle at Philadelphia* (Boston: Atlantic-Little Brown, 1966), ch XXI, pp 243-253. Anti-Federalists were astounded that the proposed Constitution failed to expressly protect the rights of free people that dated back to the Magna Carta. *Id.* at 245; *The Federalist* (New York: Barnes & Nobel, Wright ed, 1996), p 15. The Federalist response was not, however, that these rights should not be protected or should be protected differently than they had been in the past. Rather, the Federalists advanced, inter alia, that the rights of man were so well established and understood that the listing of them was not only unnecessary, as the federal government could not touch them, but

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[3] While there existed a few qualifications on the form and manner of presentation of petitions that were unique to individual colonial states, none addressed defamation. Several colonies and states required that a petition be submitted in an "orderly and peaceable manner." *Smith, supra* at 1181-1182. This requirement was consistent with statutory requirements that accompanied the English Bill of Rights, but it did not concern the content of the petition.

dangerous inasmuch as it would be impossible to list all the natural rights of man. Hamilton, *Federalist No 84* (available at Wright ed, *supra* at 535); *Bowen, supra* at 245.

Therefore, the 1787-1789 debate whether to include a bill of rights in the Constitution reveals that neither the Federalists nor Anti-Federalists questioned the vitality of the various rights specifically proposed to be listed in such a bill of rights, rights that were eventually adopted in 1791. Rather, these rights were admitted to exist and be preserved as rights natural to all men in the new Constitution, and the debate on these rights concerned only whether they should be constitutionally codified. Accordingly, this 1787-1789 discussion of the rights that were eventually incorporated as the Bill of Rights in 1791 is persuasive support for the proposition that the drafters and ratifiers of the Petition Clause clearly understood what the petition right meant: what it had always meant.

In colonial America, two characteristics of the petition right further disclose the broad reach and distinctive role the right was understood to have in our new republic. First, just as the petition right protected the king's subjects in England from prosecution for libel, petitioning was available in America to the enfranchised as well as the disenfranchised. Petitioning was apparently one of the few mechanisms by which the disenfranchised joined the enfranchised in the political life of colonial America. Mark, *supra* at 2169-2170. In fact, the right to petition was considered so fundamental to the operation of government that in documented cases "women, free blacks, and even slaves, were allowed to petition" in colonial America, as were prisoners. *Smith, supra* at 1172; *see also Mark, supra* at 2181-2184 (citing Bailey, *Popular Influence Upon Public Policy: Petitioning in*

Eighteenth Century Virginia [Westport, CT: Greenwood Press, 1979], pp 43-46).[4]

This broad availability of the right of petitioning government was contemporaneous with explicit statutory limitations on freedom of speech and press that were enacted and practiced in colonial America. Smith, *supra* at 1171 (discussing licensing of the press and punishment for offensive political speech in Massachusetts, Pennsylvania, and New York as late as the early 1720s); see also Garry, The American Vision of a Free Press (1990). "Seditious libel laws existed in all of the colonies, and punishment for statements critical of the government was an accepted, lawful practice which continued even after the framing and ratification of the *First Amendment*." Spanbauer, *The First Amendment right to petition government for a redress of grievances: Cut from a different cloth*, 21 Hastings Const L Q 15, 37 (1993). Yet, the presentation of a petition to the government was not considered a "publication" under the libel laws in both England and colonial America. *Id. at 38;* see also Clar, Comment, *Martin v City of Del City: A lost opportunity to restore the First Amendment right to petition*, 74 St John's L R 483 (2000).

In addition, while there is a clear indication that the *First Amendment* drafters rejected the idea that the people could "instruct" their representatives, the understanding of the petition right in 1787 was that petitioning was such an influential force in the idea of self-government that it included the right to consideration and response. *Mark*, *supra* at 2204-2212. In other words, the filing of a petition with the

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[4] At least in colonial Virginia, the right to petition was not limited by class, sex, or race. *Bailey*, *supra* at 43. In fact, Bailey documents that after the Virginia legislature was given authority over the manumission of slaves in 1776, petitions increased from blacks both free and enslaved. *Id.* at 44.

government entitled the petitioner to legislative consideration of the petition, as well as a legislative response to the petition.

Interestingly, one of the most powerful indications of the breadth of, and political importance attached to, the right of petition in the early days of the United States occurred within its first years of founding and immediately before the adoption of the Bill of Rights. The filing of the Quaker petitions in the 1st Congress in 1790, concerning demands for ending the practice of slavery, occasioned what many congressional members considered a constitutional crisis that might destroy the fragile new national government. See Ellis, *Founding Brothers* (New York: Knopf, 2000), ch 3, pp 81-119. What is remarkable for constitutional analysis is not that such politically and constitutionally explosive petitions were filed, but why the petitions were not simply ignored by America's new Congress and why none of the Quaker petitioners was threatened with prosecution for defamation or sedition.

It is well understood that one of the significant constitutional compromises that was struck in order to gain approval within the Constitutional Convention (and eventually among the colonies that were to adopt the proposed constitution) was the Sectional Compromise. The question of how to address the slavery issue in a national government proved to be impossible for the drafters to wholly resolve. *Ellis, supra* at 85-86. Consequently, the Sectional Compromise placed the issue of the slave trade beyond the powers of the federal government until 1808, by adding article I, § 9, cl 1, to the Constitution.[5] *Ellis, supra* at 85-86. It was believed that by thus placing the importation-of-slaves

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[5] "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." US Const, art I, § 9, cl 1.

question beyond congressional reach the issue of slavery would not raise its divisive and insoluble head, at least in the early days of the Union. *Bowen*, *supra* at 200-204. However, the founders and ratifiers who so believed had not reckoned on the passionate abolitionist Quakers of the Northeast who well understood and would exercise their right to petition. *Ellis*, *supra* at 81.

Notwithstanding clause 1 of article I, § 9, upon receipt of the Quaker petitions, one personally endorsed by Benjamin Franklin, the 1st Congress was immediately convulsed over how to proceed. *Id.* at 81-119. There was much debate about whether the Quaker petitions should be read in the House chamber because of their potential to rekindle a question the drafters of the Constitution, a number of whom were members of the 1st Congress, were unable to resolve other than by constitutionally deferring its consideration for twenty years. *Ellis*, *supra*. Eventually, the Congress resolved to refer the Quaker petitions to a special committee for a more private consideration. Thereafter, the 1st Congress adopted a resolution *permanently* precluding the consideration of the slavery question.[6] *Id.*

Again, even given the constitutional crisis that the Quaker petitions posed for the new national government, the remarkable thing about this historic episode is that there does not appear to be any indication that the 1st Congress believed

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[6] A good deal of the congressional time and activity was devoted to the debate on the Quaker petitions, with veiled threats of secession made by southern members of Congress if any aspect of slave practices were disturbed by the federal legislature. *Ellis*, *supra*. Eventually, by resolution, the 1st Congress adopted an amended recommendation of the committee formed to consider the Quaker petitions. *Ellis*, *supra* at 118 (citing De Pauw, 3 *Documentary History of the First Federal Congress of the United States* [Baltimore: John Hopkins Univ Press, 1972], p 341). That resolution forbade not only congressional consideration of the issue of slavery until 1808, but banned its consideration forever. *Ellis*, *supra* at 118.

it could simply ignore the petitions, despite Article I, § 9, cl 1. More important, *these petitioners were not prosecuted for what at least the southern members of Congress undoubtedly considered libelous, seditious statements.*

2. The Text of the Petition Clause

As a textual matter, I note that although the United States Supreme Court has stated that all the *First Amendment* rights are cut from the same cloth, *McDonald v Smith, supra* at 482, the clauses are nonetheless distinct in their natures.[7] The *First Amendment* provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Inasmuch as the *First Amendment* protects the "freedom of speech," the word "speech" has often been dissected in order to determine what constitutes speech. In this pursuit, the United States Supreme Court has often focused on the *subject* of the speech. See, e.g., *Miller v California,* 413 U.S. 15; 93 S. Ct. 2607; 37 L. Ed. 2d 419 (1973) (obscenity); *Virginia State Bd of Pharmacy v Virginia Citizens Consumer Council,*

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[7] At the least, the presentation of the Petition Clause as one separate from the clauses concerning freedom of speech in the *First Amendment* alerts us textually that the purpose and intent of the Petition Clause must be distinct from its sibling clauses. Higginson, *A short history of the right to petition government for the redress of grievances,* 96 Yale L J 142, 155-156 (1986). Further, I note that whereas the *Free Speech Clause and the Free Press Clause* are separated by a comma, both are separated from the Petition Clause by a semi-colon. See Kesavan & Paulsen, *Is West Virginia constitutional?*, 90 Cal L R 291, 334-352 (2002) (discussing, inter alia, the interpretation of the sixty-five semi-colons contained in the original constitution, particularly the punctuation of US Const, art IV, § 3 concerning the creation of new states).

Inc, 425 U.S. 748; 96 S. Ct. 1817; 48 L. Ed. 2d 346 (1976) (commercial speech); *Chaplinsky v New Hampshire*, 315 U.S. 568; 62 S. Ct. 766; 86 L. Ed. 1031 (1942) (fighting words); *RAV v City of St Paul*, 505 U.S. 377; 112 S. Ct. 2538; 120 L. Ed. 2d 305 (1992) (hate speech). In fact, case law on freedom of speech has developed a bifurcated analysis differentiating whether contested regulations on expression are "content-neutral" or "content-based." See, e.g., Tribe, American Constitutional Law (2d ed), § 12-2, pp 791-792.

However, while the text of the Free Speech Clause fairly invites an analytical focus on the *subject* of speech, the text of the Petition Clause, the right "to petition," denotes a focus not on the identity of the speaker or subject matter, but the *identity of the listener*. The text of the *First Amendment* accordingly implies that where the government is the listener, the speaker's right to petition the government is at issue.

This textual distinction is not, in my opinion, without significance. Rather, it signals the original intent of the Petition Clause to protect citizen input when presented in the form of a petition to government, regardless whether it would be considered "speech" or "press" under the sibling clauses of the *First Amendment*.

3. Post-1791 Development

While petitioning in colonial America afforded even the disenfranchised access to the People's representatives, petitioning eventually atrophied as a popular tool of self-governance at the center of our republican form of government with the increased emphasis on voting and the expansion of rights of enfranchisement in the United States.[8] *Mark*, *supra* at 2154, 2158-2160. Because petitioning itself

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[8] *See, e.g.*, the *Fifteenth*, *Nineteenth*, and *Twenty-Sixth Amendments*, which extended the right to vote to individuals regardless of race, color, or previous servitude and to women and citizens eighteen years old and older.

has receded in its political prominence, it is not hard to understand why, especially with the enormous expansion of protections now accorded under the *Free Speech Clause and the Free Press Clause* during the last century, the Petition Clause has lacked apparent independent political importance in constitutional adjudication. Despite what I believe is a compelling historical and textual case for according the Petition Clause distinctive meaning,[9] by the twentieth century, the federal judiciary had all but relegated the Petition Clause to the status of a step-sibling without independent identity or import apart from the Free Speech Clause and the Free Press Clause of the *First Amendment*. Our contemporary Petition Clause jurisprudence is thus entirely anchored in that developed under the other *First Amendment* clauses. *See, e.g., McDonald, supra.*

4. Resolution

Although I would adhere to the principle that a constitutional provision is to be interpreted consistently with its original understanding,[10] I acknowledge that our obligation

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[9] Further, it seems illogical that the founders, wary of an overpowering and unaccountable federal government, would create immunity from defamation for governmental actors under the Speech and Debate Clause, US Const, art I, § 6, cl 1, but expose the People to defamation when petitioning. *Barr v Matteo*, 360 U.S. 564; 79 S. Ct. 1335; 3 L. Ed. 2d 1434 (1959). Consider a mutually libelous exchange between a citizen and a congressman at a congressional hearing. While the congressman would be absolutely immune from liability because of the Speech and Debate Clause, under *McDonald*'s interpretation of the Petition Clause, the citizen would face potential liability. Such an outcome seems incompatible with the founders' understood view that the People are the masters and the government the servant.

[10] While I acknowledge that contemporary, postratification judicial interpretations of a constitutional provision could permissibly aid an effort to determine the original intent of a provision, I suggest that such consideration is misplaced where the original intent can be surmised from the preratification understanding of the provision's meaning. Inasmuch as *McDonald* essentially ignores the preratification understanding of the

is to follow the United States Supreme Court's interpretation of this constitutional provision. In light of the Court's holding that absolute immunity from defamation does not exist for petition activity in *McDonald*, I accept as I must the analysis offered in my majority opinion.

However, I believe the history and text of the petition right, as analyzed above, support an interpretation that the Petition Clause is distinct from its *First Amendment* siblings and therefore deserves consideration regarding whether distinct treatment in the constitutional law of defamation is warranted under the Petition Clause. For this reason, I believe *McDonald* was incorrectly decided.

II. Application of the *McDonald* Principle

While I concur in the majority opinion because of the clear direction provided by *McDonald*, in addition to my original-intent analysis, I believe there are meritorious arguments for declining to extend the private-figure and public-figure defamation distinction to cases involving the right to petition. Further, the flaw of the *McDonald* principle that the *First Amendment* clauses are to be treated without distinction in defamation cases is exposed, in my opinion, by the extension of the private-figure and public-figure dichotomy to petition-right cases—particularly the present case.

The rationale for the private-figure and public-figure dichotomy announced in *Gertz v Robert Welch, Inc*, 418 U.S. 323; 94 S. Ct. 2997; 41 L. Ed. 2d 789 (1974), seems

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petition right, I find its concentration on the postratification case law insufficient and unjustified. Schnapper, *supra* (stating that *McDonald* fails "to discuss any seventeenth- or eighteenth-century materials that might reveal the contemporaneous understanding of the petition clause, but relies instead solely on postratification materials," *id.* at 305, and concluding that "had McDonald written his letter . . . to President Washington or to George III, rather than to President Reagan, a libel action by Smith would have been dismissed out of hand," *id.* at 343).

potentially misplaced in petition settings where the alleged defamation damages derive from the resulting actions of the government. *Gertz* reasoned that private individuals are more vulnerable to defamation than public figures because public figures have "significantly greater access" to the media and can use the media to counteract false statements. *Gertz, supra* at 344.[11]

It is arguable that the *Gertz* "access to the media" rationale in the free speech and free press contexts is ill-fitted to the right to petition context, particularly where a plaintiff's damages are a product of the adverse actions of government, albeit induced by a third party. Unlike falsehoods disseminated by or in the media, access to city council meetings is not similarly limited. City council meetings are generally not run so that only public figures can be heard and private figures ignored. A central purpose of a public meeting of the city council is to allow citizenry input and to maximize the exposure of the government's decision-making in an open meeting.

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[11] I recognize that *Gertz* also opined that public figures deserve less protection against defamation because they have "voluntarily exposed themselves to increased risk of injury from defamatory falsehoods," *Gertz, supra* at 345, unlike private persons. While this reasoning would appear to provide an alternative *Gertz*-based avenue for extending the private- figure and public-figure dichotomy to the Petition Clause, I suggest that this rationale is also perhaps misplaced in a petition setting like the present one.

Although it is well established in the case law on freedoms of speech and press that a private figure who throws himself into a public dispute can become a limited purpose public figure for defamation qualified immunity purposes, *Gertz, supra* at 351, plaintiff in this case petitioned the city council to award him a public contract. It appears questionable to me that one who invites comment from his fellow citizens by petitioning the government on a public issue, seeking the fruits of a taxpayer-funded construction project, remains a private figure.

In fact, the access to respond to defamatory statements in a petition context is evident in the present case, where plaintiff was given the opportunity at the city council meeting to answer defendant's assertions. Further, the Petition Clause itself protected plaintiff's right to deliver a written petition to the city council in order to answer the defamatory statements made by defendant. For these reasons, it is questionable whether the rationale for the private- figure and public-figure dichotomy announced in *Gertz*, and applied in defamation actions involving freedom of speech or freedom of press, provides a solid foundation for the private-figure and public-figure standard in the right to petition context. This extension is particularly questionable where the damages are a result of a decision made by the listener, a city council, to which both plaintiff and defendant have constitutionally guaranteed access under the Petition Clause.

III. Conclusion

An analysis of the original understanding of the Petition Clause leads to the conclusion that *McDonald* was incorrectly decided. Consistent with its preratification history and its text, I believe that the Petition Clause offers protections distinct from its sibling clauses under the *First Amendment* and that the defendant union representative's statements were absolutely immune from defamation liability.

However, *McDonald* provides this Court with clear direction about whether the private-figure and public-figure dichotomy of free speech and free press defamation law is to be extended to petition right defamation cases. As this Court is bound by *McDonald* because of the *Supremacy Clause of the United States Constitution*,[12] I reluctantly but obediently agree with the analysis set forth in my majority opinion.

Robert P. Young, Jr.

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[12] US Const, art VI, cl 2.

DISSENT: CAVANAGH, J. (*dissenting*).

I agree with the majority's observation that the United States Supreme Court has never been squarely presented with the question whether the public-figure and private-figure dichotomy embodied in the case law on defamation involving First Amendment's Free Speech Clause and Free Press Clause should extend to defamation cases involving the Petition Clause. However, I disagree with the majority's conclusion that *McDonald v Smith*, 472 U.S. 479; 105 S. Ct. 2787; 86 L. Ed. 2d 384 (1985), requires application of the public-figure and private-figure dichotomy to Petition Clause defamation cases. While, arguably, *McDonald* may allow application of the dichotomy to Petition Clause defamation cases, it certainly does not require it. Further, the principles expressed by our high court do not support the majority's conclusion. Because I do not agree with the majority's assertion that *McDonald* forces states to import the public-figure and private-figure dichotomy to Petition Clause defamation cases, and because I recognize the historical significance of the Petition Clause, as well as the fact that the text and structure of the Petition Clause in the Michigan Constitution differ from the text and structure of the First Amendment of the United States Constitution, I respectfully dissent. I would ask the parties for additional briefing regarding the effect of the Petition Clause in the Michigan Constitution.

I. THE PETITION CLAUSE: IS THERE A PUBLIC-FIGURE VERSUS PRIVATE-FIGURE DISTINCTION?

The majority acknowledges that the defamation action in *McDonald* was brought pursuant to North Carolina's common law, which requires a showing of "actual malice" to recover for defamation, regardless of whether the plaintiff is a

public or a private figure.[1] The majority concludes that this application of state law by the United States Supreme Court "strongly signaled its view that all Free Speech Clause and Free Press Clause defamation doctrine developed in the past forty years is to be imported without change to constitutional adjudications arising under the Petition Clause" [2] and rejects an alternative interpretation, instead relying on *Arkansas v Sullivan*, 532 U.S. 769; 121 S. Ct. 1876; 149 L. Ed. 2d 994 (2001). The majority states:

> In interpreting the *federal* constitution, state courts are not privileged to provide greater protections or restrictions when the Supreme Court of the United States has refrained from doing so. [*Ante* at 11 n 9.]

In *Sullivan,* the United States Supreme Court reversed the Arkansas Supreme Court's holding that it was free to interpret the United States Constitution to provide greater protection than United States Supreme Court federal constitutional precedent provides. The *Sullivan* Court noted that such a possibility was foreclosed by *Oregon v Hass*, 420 U.S. 714; 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975):

> We reiterated in *Hass* that while "a State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards," it "may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them." [*Sullivan* at 772, quoting *Hass* at 719 (emphasis in original).]

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[1] Plaintiff's cause of action in this case, by contrast, arises under Michigan's defamation statute, *MCL 600.2911(7)*, which provides:

> An action for libel or slander shall not be brought based upon a communication involving a private individual unless the defamatory falsehood concerns the private individual and was published negligently. Recovery under this provision shall be limited to economic damages including attorney fees.

[2] *Ante* at 10.

The majority's reliance on *Sullivan* is misplaced for two reasons. First, requiring all plaintiffs to prove that defamatory statements were made with actual malice in Petition Clause defamation cases would not impose a "greater restriction" than that imposed by the United States Supreme Court in *McDonald*. In fact, it would apply the same standard utilized by the Court in *McDonald*. The majority's reliance on *Sullivan* is also misplaced because the United States Supreme Court has not "specifically refrained" from applying the actual-malice standard to private-figure plaintiffs in Petition Clause defamation claims. This remains, as acknowledged by the majority, a question not yet decided by the United States Supreme Court.

Further, in *McDonald,* the United States Supreme Court held that the right to petition should be accorded *no greater protection* than other *First Amendment* expressions, inasmuch as absolute immunity was held inappropriate. *McDonald* did not hold that the right to petition was limited to *the same protection* as the rights to free speech and free press. The Court did not indicate a clear intent to import the veritable plethora of jurisprudence surrounding the rights to free speech and free press into Petition Clause defamation.

Moreover, the principles articulated in *McDonald* do not support the interpretation employed by the majority. The question the Court was presented with in *McDonald* was whether the *Petition Clause of the First Amendment* provides absolute immunity to a defendant charged with expressing libelous and damaging falsehoods in letters to the President of the United States. [*McDonald* at 480.]

The Court repeatedly examined the claim of absolute immunity in light of the actual-malice standard. Reviewing early state libel cases, the *McDonald* Court determined that there were conflicting views of the privilege afforded petitioners: some states afforded petitioners absolute immunity, while others allowed recovery for petitioning

activity performed "maliciously, wantonly, and without probable cause . . . ." *Id.* at 483, quoting, *Gray v Pentland*, 2 Serg & R 23 (Penn, 1815). The *McDonald* Court also noted that in *White v Nicholls*, 44 U.S. (3 How) 266; 11 L. Ed. 591 (1845), it did not recognize an absolute privilege, rather it concluded that "the defendant's petition was actionable if prompted by 'express malice . . . .'" *McDonald* at 484. The *McDonald* opinion does not mention negligence; it simply holds that there is not absolute immunity for Petition Clause defamation.

As scholars have noted:

> The text [of *McDonald*] merely requires proof of actual malice 'defined . . . in terms . . . consistent with *New York Times v. Sullivan*.' If the Court had intended to establish the entire public/private figure [dichotomy] for Petition Clause [defamation] cases, [it] would have discussed *Gertz v Robert Welch, Inc.* [Gary, *First Amendment Petition Clause immunity from tort suits: In search of a consistent doctrinal framework*, 33 Idaho L R 67, 110 (1996)(citations omitted).]

McDonald is more commonly interpreted as employing the actual-malice standard of *New York Times Co v Sullivan*, 376 U.S. 254; 84 S. Ct. 710; 11 L. Ed. 2d 686 (1964); to interpret *McDonald* as incorporating the public-figure and private-figure dichotomy is a misreading of the case. *Gary* at 109; see also, 4 Rotunda & Nowak, Treatise on Constitutional Law (3d ed), § 20.53, p 690 n 3 (The Petition Clause does not require state libel law to expand the qualified privilege already afforded by *New York Times*.).

Justice Brennan's concurrence in *McDonald* provides useful insight, he stated:

> There is no persuasive reason for according greater or lesser protection to expression on matters of public importance depending on whether the expression consists of speaking to neighbors across the backyard

> fence, publishing an editorial in the local newspaper, or sending a letter to the President of the United States. It necessarily follows that expression falling within the scope of the Petition Clause, while fully protected by the actual-malice standard set forth in *New York Times Co v Sullivan*, is not shielded by an absolute privilege. [*McDonald* at 490.]
>
> "This forceful statement suggests that actual malice is the standard for petitioning activity, regardless of the status of the plaintiff." Gary at 112.

Thus, while it is clear that the United States Supreme Court intended that a defendant claiming immunity from defamation on the basis of the Petition Clause not be afforded absolute immunity, it is not at all clear that the Court intended the qualified immunity to apply differently depending on whether the plaintiff is a public or a private figure. The majority's assertion that *McDonald requires* the states to import the public-figure and private-figure dichotomy applicable in free-speech and free-press cases is simply not supported by a careful reading of that case.

II. MICHIGAN'S PETITION CLAUSE

While I recognize the principles underlying, and the historical significance of, the Petition Clause, as outlined by Justice Young in his concurring opinion, I am reluctant to question the wisdom of the United States Supreme Court in interpreting the federal constitution. However, on the basis of the principles noted in Justice Young's concurring opinion, I think the bench and bar in this state would benefit from a thorough analysis of the protections afforded petitioners under the Michigan Constitution. Because this Court was not presented with such an analysis, I would request additional briefing from the parties.

Notably, the structure of Const 1963 differs from the federal constitution. Each right included in the *federal constitution's First Amendment* is expressed as a separate

clause in Const 1963, art 1, the Declaration of Rights. Const 1963, art 1, in pertinent part, provides:

> Sec 2. No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.
>
> Sec 3. The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the government for redress of grievances.
>
> Sec. 4. Every person shall be at liberty to worship God according to the dictates of his own conscience. . . .
>
> Sec. 5. Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of such right; and no law shall be enacted to restrain or abridge the liberty of speech or of the press.

By contrast, the *First Amendment to the federal constitution* provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. [*US Const, Am I.*]

Because *McDonald*'s determination that the rights to free speech and free press and the right to petition were inseparable was based on the structure of the Petition Clause, and because the structure of Michigan's Petition Clause is decidedly different from the federal clause, I would inquire whether the framers of the Michigan Constitution intended to afford greater protection to petitioners by creating a distinct clause. Because this issue was not briefed by the parties, and,

thus, is not properly before the Court, I would ask the parties for further briefing on the issue.

III. CONCLUSION

I do not agree with the majority that *McDonald* requires states to impose the public-figure and private-figure dichotomy when deciding Petition Clause defamation cases. Further, *McDonald* can be and has been interpreted as establishing that, whenever the right to petition is exercised, that right is afforded the protection of the actual-malice standard. Because I believe it may be significant that the text and structure of Michigan's Petition Clause differs from the *federal constitution's First Amendment* and because I recognize the historical significance of the right to petition in a democratic society, I would request additional briefing.

Michael F. Cavanagh, Marilyn Kelly

APPENDIX B

COURT OF APPEALS OF MICHIGAN

No. 215090

J & J CONSTRUCTION COMPANY,
Plaintiff-Appellee,

v

BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 1
and MARK KING,
Defendants-Appellants.

December 11, 2000, Submitted
May 11, 2001, Decided

OPINION

Before: McDonald, P.J., and Neff and Fitzgerald, JJ.

Defendants, Bricklayers and Allied Craftsman, Local 1 (the union), and Mark King, one of its representatives, appeal as of right a judgment in favor of plaintiff, J & J Construction Company, after a bench trial involving claims of defamation and interference with a business expectancy. Plaintiff was awarded $ 57,888 in damages, $ 104,286.95 in costs and attorney fees, and $ 26,044.51 in interest. We reverse in part and remand.

FACTS

The material facts are not in dispute. In 1995, the city of Wayne solicited bids for the construction of the Wayne Aquatic Center and plaintiff submitted the lowest bid for the masonry contract. Defendant King, acting as business agent

for the union, appeared before the city council and expressed doubts concerning whether plaintiff performed quality work or paid the prevailing wage, leading the council to award the contract to another bidder.

The Wayne city attorney testified that, as a matter of municipal law, the city was obligated to award contracts to the lowest qualified bidder meeting specifications unless the city council determined that the public interest would be better served by accepting a higher bid. At the city council meeting in May 1995, defendant King spoke on the subject of plaintiff and indicated that plaintiff did not pay the prevailing wage and had poor workmanship. King also showed some photographs supposedly depicting plaintiff's work. The council voted to table the contract and voted the following month to reject plaintiff's bid because of concerns about faulty workmanship and failure to pay prevailing wage and benefits.

Defendant King testified that he was as knowledgeable in the bricklaying trade as the average bricklayer. In March 1995, he took photographs of plaintiff's work at Novi High School for the purpose of showing shortcomings in craftsmanship. These photographs were shown to the Wayne city council. In the pictures, he was trying to show an inconsistency in the sizes of the joints in the locker room wall, which King regarded as indicative of poor workmanship. Another photograph taken at Novi High School was described as showing work that was "really terrible," "a cardinal sin" in bricklaying. King offered further technical descriptions of supposed deficiencies that he detected in that job.

King testified that, at the city council meeting, he stated that plaintiff lacked the ability to do to the job for which plaintiff was bidding, and also that plaintiff might be unable to complete the work in a timely manner. King additionally testified that he commented that plaintiff "is a non-union contractor and this is a union town."

Concerning the basis for his suggestion that plaintiff might not be able to complete the job on time, King described jobs where plaintiff was obliged to engage subcontractors in order to meet a deadline. King conceded that he knew of no job that plaintiff had not finished on time.

King agreed that prevailing wages and benefits were set by the state of Michigan and that, when he suggested to the city council that plaintiff did not comply with the prevailing wage act, the only related documentation he had in his possession was certified payrolls from plaintiff stating that plaintiff had in fact complied as concerned the Novi job. King stated that he had not checked with the state, or with any official involved in the Novi job, to verify the matter. However, King testified that he spoke with two of plaintiff's bricklayers, who said that plaintiff did not pay benefits, but that upon talking to one of them a second time he did learn that insurance coverage began after sixty days on the job. King conceded that the sixty-day waiting period for insurance was shorter than the six hundred working hours for which a union contractor had to wait. He also conceded that, despite the certified payrolls indicating that plaintiff pays benefits and statements from the bricklayers that they were going to get benefits, he still informed the city council that plaintiff does not comply with the prevailing wage law.

On cross-examination, King testified that he knew from experience that contractors' certified payroll statements did not always accurately reflect the actual practices. King explained that "pensions, holiday pay, stuff along that line" contributed to the prevailing wage calculation, and that he did not believe that health insurance coverage combined with $ 23 an hour added up to the prevailing wage in this instance.

George Hamlin testified that, during 1994-95, he was senior superintendent for Barton Mallow, a company of construction managers, and that he had served as senior superintendent for the Novi High School job. Hamlin

confirmed that plaintiff was the masonry contractor for the job. Hamlin stated that he had inspected an earlier job by plaintiff and found it to be "satisfactory." Hamlin rated plaintiff's masonry work as "about a hundred percent better than the existing school's workmanship." Hamlin added that there had been no problem with plaintiff meeting completion deadlines. Hamlin explained that plaintiff had been obliged to integrate new work with existing masonry in several places, and that in no instance had plaintiff done faulty work, but in some instances where irregularities were present plaintiff had done the job as directed by Hamlin.

George Ehlert identified himself as president and principal engineer for Ehlert, Bryant Consulting Engineers of Southfield. Ehlert testified that his review of the plans for Novi High School indicated that the masonry work specified by the architect and the owner was "standard masonry," "no higher than average quality standards." Ehlert further opined upon review of plaintiff's work on that job that plaintiff's results fit "well within the tolerances" specified.

Plaintiff charged defendants with defamation and tortious interference with a business relationship or expectancy. The trial court concluded that plaintiff had failed to prove that King's statements concerning plaintiff and prevailing wages were false. However, the court found that King's statements concerning plaintiff's quality of work and ability to do the job on time were false, and negligently so. The court further concluded that King was acting on behalf of the defendant union, and so the latter shared in the responsibility for any damages. The court thus held both defendants liable for defamation and tortious interference with business expectancy. With regard to damages, the court found that plaintiff's business reputation had not been hurt and that damages were limited to the lost profit from the rejected bid, plus interest, costs, and attorney fees.

I

Defendants argue that the trial court erred in finding them liable for tortious interference with a business expectancy as the result of defendants' use of misleading statements to persuade a governmental entity not to award a contract to plaintiff. They contend that they were engaged in political advocacy that was immune from suit under the *Noerr-Pennington* doctrine.

The two seminal cases that engendered the name of the doctrine at issue are *Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc.*, 365 U.S. 127; 81 S. Ct. 523; 5 L. Ed. 2d 464 (1961), and *United Mine Workers of America v Pennington*, 381 U.S. 657; 85 S. Ct. 1585; 14 L. Ed. 2d 626 (1965).

Noerr concerned competition between trucking and railroad concerns and attempts by each interest to engage in publicity campaigns designed to foster adoption and enforcement of laws harmful to the other, as well as to degrade the public image of the other's enterprise, and to impair relationships between the rival and existing customers. *Noerr*, 365 U.S. at 128-129, 132-133. Each accused the other of violating antitrust law. *Id.* The United States Supreme Court ruled that "no violation of the Sherman Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Noerr*, 365 U.S. at 135. The Court added, "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Noerr*, 365 U.S. at 137. The Court also touched on the First Amendment issue: "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms." *Noerr*, 365 U.S. at 138. In this regard, deception of the public and of public officials, "reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned." *Noerr*, 365 U.S. at 145. The

Court thus "restored what appears to be the true nature of the case—a 'no-holds-barred fight' between two industries both of which are seeking control of a profitable source of income." *Noerr*, 365 U.S. at 144.

Pennington involved a mine workers' union and large mining interests that had conspired to put smaller mining concerns out of business, including by way of lobbying the government to establish an unusually high minimum wage for employees of contractors selling coal to the Tennessee Valley Authority that the smaller competitors could not afford. *Pennington, supra* at 381 U.S. 660. The United States Supreme Court explained that "Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Pennington, supra* at 670. The Court disparaged a lower court for concluding that proof of an illegal purpose removed such advocacy from the protections of *Noerr*. *Pennington, supra* at 670 . The Court elaborated: "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *Id.*

Other than *Noerr*'s brief mention of the constitutional right to petition government, *Noerr* and *Pennington* both concern themselves with antitrust legislation. However,

> "although the *Noerr-Pennington* doctrine initially arose in the antitrust field, other circuits have expanded it to protect first amendment petitioning of the government from claims brought under federal and state laws, including . . . common-law tortious interference with contractual relations. . . . There is simply no reason that a common-law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust." *Arim v General Motors Corp*, 206 Mich. App. 178, 191; 520 N.W.2d

695 (1994), omitting citations and quoting with approval *Video Int'l Production, Inc v Warner-Amex Cable Communications, Inc*, 858 F.2d 1075, 1084 (CA 5, 1988).

Stated otherwise, "the *Noerr-Pennington* doctrine is a principle of constitutional law that bars litigation arising from injuries received as a consequence of First Amendment petitioning activity, regardless of the underlying cause of action asserted by the plaintiffs." *Azzar v Primebank, FSB*, 198 Mich. App. 512, 517; 499 N.W.2d 793 (1993). In *Azzar*, this Court, citing *Noerr-Pennington*, held that the defendants had a First Amendment right to lobby the Federal Home Loan Bank Board not to approve a proposed stock acquisition. *Azzar*, 198 Mich. App. at 514-517. This Court emphasized that the First Amendment protects a petitioner from tort liability even for intentionally misrepresenting facts to the governmental entity. *Id.* at 517.

This Court continued, "Nevertheless, knowingly and maliciously made allegations in petitions to government are not protected under the First Amendment from liability for defamation." *Id.* at 518. Defamation was not alleged in *Azzar*. *Id.* Defendants argue that if the underlying political advocacy was itself defamatory, *Noerr-Pennington* does not apply. However, because *Azzar* emphatically stands for the proposition that "knowing falsehoods are generally protected under the First Amendment right to petition," *Azzar*, 198 Mich. App. at 518-519, we read the case as standing for the proposition that defamation—injury to a person's good name—is actionable as the result of petitioning the government only where the petitioning was actually a "sham."

Concerning the "sham exception" to the *Noerr-Pennington* doctrine, the United States Supreme Court stated, "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt

to interfere directly with the business relationships of a competitor . . . ." *Noerr, supra*, 365 U.S. at 144. The Court then makes clear that a "genuine effort to influence legislation and law enforcement," particularly a "highly successful" one, cannot violate the Sherman Act. *Id.* This Court recognized that the "sham exception to the *Noerr* doctrine involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all and is inapplicable to the defendant who genuinely seeks to achieve his governmental result, but does so through improper means." *Azzar, supra* at 198 Mich. App. 518, citing *City of Columbia v Omni Outdoor Advertising, Inc*, 499 U.S. 365; 111 S. Ct. 1344, 1354; 113 L. Ed. 2d 382, 398 (1991). *Arim* applied the "sham" exception to baseless litigation intended only to force a competitor to bear the burdens of litigation. *Arim, supra* at 190.

In this case, the trial court concluded that defendants had committed defamation, but did not suggest that defendants acted without a serious intention of influencing the Wayne city council. Indeed, defendants succeeded in persuading the council to award their masonry contract to a concern other than plaintiff, thus making it impossible for the sham exception to apply. *Noerr, supra* at 365 U.S. 144.

Defendants further argue that, where government action effects some sort of injury, the government is the proximate cause of that injury, not the private parties who may have influenced the government. Defendants additionally note that *Pennington* concerned efforts to persuade the Tennessee Valley Authority to purchase coal only from particular suppliers, and thus argue that *Pennington* itself "dealt with the government acting in a purchasing capacity." However, in *Pennington* this was a matter of setting policy, in the form of a minimum wage, not of selecting specific vendors. 381 U.S. at 660. *Pennington* thus can be summoned in support of both points of view.

We find defendants' arguments convincing. That lobbying for favorable political action is an inherent part of the nature of government, and of the fabric of our society, should be too obvious to require citation. Also self-evident is that such lobbying characteristically includes placing one's interests in the best light and trying to place a rival's interests in the worst possible light. The right to petition government should immunize any petitioner from liability for the resulting actions of government, not just objective and fair-minded petitioners who disclose all motives behind their campaigns.

However, plaintiff cites several federal cases for the proposition that the *Noerr-Pennington* doctrine does not insulate a petitioner from liability for false representations made in the course of influencing a governmental entity to act where the governmental entity is not setting or enforcing policy but is instead simply acting as a market participant. Although the cases cited are not binding on this Court, the cases remain persuasive authority.

Plaintiff relies heavily on *George R. Whitten, Jr., Inc v Paddock Pool Builders*, Inc, 424 F.2d 25 (CA 1, 1970), an antitrust case. As in the instant case, that case concerned a governmental entity contracting for construction of a swimming pool. The federal court held that where a bidder induced governmental patronage by misconduct, including false statements about a competitor's lack of experience, 424 F.2d at 28, the *Noerr-Pennington* doctrine did not apply, *Whitten*, 424 F.2d at 32-24, on the ground that the governmental entity was acting "in a proprietary capacity, purchasing goods and services to satisfy its own needs within a framework of competitive bidding." *Id.* at 29.

However, the federal circuits are not unanimous on this issue. Fifteen years after *Whitten*, the Fifth Circuit, Court of Appeals in another antitrust case, expressly rejected this aspect of *Whitten*. *Greenwood Utilities Comm v Mississippi Power Co*, 751 F.2d 1484, 1505 n 14 (CA 5, 1985). The court

decreed, "the protected status of the agreement adopted ought properly to hinge on the protected status of the petitioning conduct that sought the government action." 751 F.2d at 1505. The court further stated:

> We reject any notion that there should be a commercial exception to *Noerr-Pennington*, because although such a distinction may be intuitively appealing it proves difficult, if not impossible, of application in a case . . . where the government engages in a policy decision and at the same time acts as a participant in the marketplace. 751 F.2d at 1505.

Defendants fail to point to cases expressly rejecting the reasoning espoused by *Whitten*, but argue that the cases on which plaintiff relies were decided before the United States Supreme Court reaffirmed that the "only" exception to the *Noerr-Pennington* doctrine is the "sham" exception," citing *City of Columbia v Omni Outdoor Advertising, Inc*, 499 U.S. 365; 113 L. Ed. 2d 382, 111 S. Ct. 1344 (1991). However, defendants provide no pinpoint citation for the proposition that the sham exception was heralded as the exclusive exception to *Noerr-Pennington* to the extent of overruling those cases that held that the doctrine does not apply where the government is making procurement decisions, including fielding competitive bids. Instead, *Columbia* considered and rejected a "conspiracy" exception to *Noerr-Pennington*, *Columbia*, 499 U.S. at 374, while nowhere hinting that the "sham" exception held that status exclusively as a matter of law. The Court has not resolved the question whether the doctrine applies where the government is acting as a market participant.[1]

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[1] Cases comporting with *Whitten* include the following: *Israel v Baxter Laboratories, Inc*, 151 U.S. App. D.C. 101, 466 F.2d 272, 275-277 (1972) (applying *Whitten* to drug manufacturers' joint efforts to lobby the FDA to keep a competitor's product off the market; efforts to "preclude," not "induce," fair consideration of a competitor's product fall within the

Plaintiff contends that the proper focus is on the role of the governmental entity petitioned, suggesting that if a governmental entity is accepting bids on a contract, it is stepping outside its governmental role and acting purely as a market participant, and so *Noerr-Pennington* should not apply. However, plaintiff cites no case that specifically identifies the "commercial exception" with the petitioner's role as seeker of patronage as opposed to the government's role as market participant seeking to fulfill its own needs. Further, if it is proper to distinguish between government performing a purely governmental function and government

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"sham" exception to *Noerr-Pennington*); *Woods Exploration & Producing Co v Aluminum Co of America*, 438 F.2d 1286, 1294 (CA 5, 1971) *Whitten*, supra at 30; *Hecht v Pro Football, Inc*, 144 U.S. App. D.C. 56, 444 F.2d 931, 934 (1971); *F Buddie Contracting, Inc v Seawright*, 595 F. Supp. 422, 439 (ND Ohio, 1984) (recognizing that the Sixth Circuit has not decided the issue and adopting the view that *Noerr-Pennington* does not apply "where the parties are concerned with the award of a competitively bid contract which only incidentally involves a governmental body"); *Hill Aircraft & Leasing Corp v Fulton Co*, 561 F. Supp. 667, 675 (ND Ga, 1982) (*Noerr-Pennington* "is not a defense for parties who seek to influence officials acting in a purely commercial, or proprietary, rather than 'governmental' capacity"), *aff'd* 729 F.2d 1467 (CA 11, 1984) (unpublished).

Cases distancing themselves from *Whitten* include the following: *In re Airport Car Rental Antitrust Litigation*, 693 F.2d 84, 88 (CA 9, 1982) (distinguishing *Whitten*, "There is no commercial exception to *Noerr-Pennington*); *Reaemco, Inc v Allegheny Airlines*, 496 F. Supp. 546, 556 n 6 (SDNY 1980) (the "argument, based on *Whitten*, that the *Noerr-Pennington* doctrine insulates only those acts aimed at influencing governmental action on broad policy questions involving the passage or enforcement of legislation, and not actions related to narrow issues between specific parties, must be rejected in light of the contrary conclusion of *California Motor Transport v Trucking Unlimited*, 404 U.S. 508; 92 S. Ct. 609; 30 L. Ed. 2d 642 (1972)."); *Bustop Shelters, Inc v Convenience & Safety Corp*, 521 F. Supp. 989, 996 (SD NY, 1981) ("*Whitten* . . . has been disapproved in this circuit, as implicitly overruled or weakened by *California Motor Transport*.").

seeking to fulfill its own needs, this case does not provide an opportunity to recognize it. The city of Wayne in this instance was fielding bids for a swimming pool. There is no suggestion that the Wayne Aquatic Center was envisioned as a governmental benefit for its own operatives; presumably the pool was for public use, indicating that the city was *not* fulfilling its own needs, but was instead providing a facility for the benefit of the general public.[2]

Our research has unveiled no Sixth Circuit decisions resolving this federal question. Nor have the appellate courts of this state fully resolved the issue as presented in this case. Thus, the question whether *Noerr-Pennington* applies in this state to situations such as that presented in the instant case comes to this Court as one of first impression.

It is not obvious why different rights, duties, or immunities should apply when one is lobbying for political action in the form of outright commercial patronage, as opposed to legislation or enforcement actions. As *Hill Aircraft, supra,* a case friendly to the commercial exception to *Noerr-Pennington*, conceded, "The line between policymaking and commercial activity is not easy to draw . . . ." 561 F. Supp. at 675. Government, unlike a private business, is politically accountable to, and ostensibly responsible to act on behalf of, the general public. All persons concerned should expect petitioners for governmental action to proceed with the most selfish of motives and tactics; government, not its supplicants, should bear the responsibility for the decisions government makes, and for the influences it accepts.

Further, the problems with identifying cause and effect identified by *Sessions Tank Liners, Inc v Joor Mfg, Inc*, 17 F.3d 295, 300 (CA 9, 1994), come to bear in the instant case.

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[2] *Whitten* notwithstanding. 424 F.2d at 29 (characterizing the acceptance of bids for a swimming pool as government fulfilling its own needs).

The minutes of the Wayne city council reflect that the council rejected plaintiff's bid because of concerns about plaintiff's workmanship and failure to pay the prevailing wage. However, there is no way to ascertain the extent to which each consideration affected the council's decision. The trial court found King's representations concerning plaintiff's craftsmanship to be false, but did not so regard King's representations concerning plaintiff and the prevailing wage. Thus, the council acted in response to one argument that was found to support a claim of defamation, and for one that was found not to, and the extent to which the latter, legally unactionable, representation tipped the balance is undiscoverable. Further, the lack of mention in the minutes of any preference for union workers should not foreclose the possibility that prounion sentiments, obviously a legitimate political consideration, affected the decision. Accordingly, we conclude that plaintiff is not entitled to damages resulting from the loss of the government contract, and we reverse the trial court's judgment in this regard.

II

Next, defendants contend that the underlying controversy in this case was a labor dispute and, therefore, the National Labor Relations Board has exclusive jurisdiction over the matter. We disagree.

Section 157 of the National Labor Relations Act (NLRA), 29 USC § 141 *et seq.*, sets forth the rights of employees to organize into unions. Section 158 in turn lists unfair labor practices. Section 160(a) empowers the National Labor Relations Board (NLRB) "to prevent any person from engaging in any unfair labor practice . . . affecting commerce." The United States Supreme Court has interpreted the NLRA to confer broad exclusive jurisdiction on the NLRB to resolve labor disputes: "When an activity is arguably subject to § 7 29 USC 157 or § 8 29 USC 158 of the Act, the States as well as the federal courts must defer to the exclusive

competence of the National Labor Relations Board if the danger of state interference with national labor policy is to be averted." *San Diego Building Trades Council v Garmon*, 359 U.S. 236, 245; 79 S. Ct. 773; 3 L. Ed. 2d 775 (1959).

Where an action for tortious interference with business lies at the heart of a labor dispute, the claim is preempted by the NLRA. *Falls Stamping and Welding Co v Int'l Union, UAW*, 744 F.2d 521, 524-525 (CA 6, 1984). However, matters of "merely peripheral concern" to federal labor law, involving interests "deeply rooted in local feeling and responsibility," are not preempted by the NLRA. *Garmon, supra*, 359 U.S. at 243-244.

Defendants cite §§ 157 or 158 of the NLRA generally, but point specifically only to subsection 158(b)(4) in support of their argument. That provision itself is quite general, identifying several actions as unlawful for a union to take. Subsection (b)(4)(i) concerns secondary strikes, which are not at issue here. Subsection (b)(4)(ii)(A) covers "forcing" an employer to join a union or enter into prohibited agreements; subsection (b)(4)(ii)(B) covers "forcing or requiring any person" to engage in secondary boycotts, or to recognize a union whose employees are not certified as belonging to that union; subsection (b)(4)(ii)(C) covers "forcing or requiring" an employer to recognize a union where the employer's work force already has a union; subsection (b)(4)(ii)(D) covers "forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class . . . ." Each provision of subsection 158(b)(4) thus concerns some improper use of force; because defendants in this case can hardly be construed to have "forced" the city council not to accept plaintiff's bid, none of those provisions comes to bear on this case.

Defendants cite several cases that illustrate the breadth of activities that have been determined to come under the exclusive jurisdiction of the NLRB. However, each concerns overt union advocacy (e.g., supporting a strike in progress, members' pamphleteering at a mall to object to a nonunion contractor), whereas the instant case concerned only what was a lone union official, presenting himself as nothing more than a concerned citizen, reminding a city council that the low bidder on a job was nonunion, raising the issue of prevailing wage, and stating that the city was a "union town." There was no organized campaign to induce plaintiff's work force to join a union. King's general prounion statements, and concerns about the prevailing wage, do not, in the context of urging a city council to reject the lowest bidder, fall within the NLRA. Such broad deference to exclusive NLRB jurisdiction would remove from state and federal courts virtually any action connected in some way with employment where someone expresses sentiments concerning unionization somewhere in the course of the underlying controversy.

For these reasons, the trial court correctly concluded that the instant cause of action was not preempted by federal law, and thus properly entertained the cause in state court.

III

Defendants also contend that the trial court erred in using an ordinary negligence standard in finding defendants liable for damaging misstatements made in the course of petitioning the government.

Defendants concede that "knowing and malicious falsehoods made in the course of petitioning activity can be challenged in a defamation action, . . . but care must be taken that defamation not be used to vitiate the absolute First Amendment protection afforded by *Noerr-Pennington.*" Because the threat of defamation actions could "dampen the ardor of labor debate," and because "the availability of libel

actions may pose a threat to the stability of labor unions and smaller employers," the United States Supreme Court has ruled, "We . . . limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." *Linn v United Plant Guard Workers of America*, 383 U.S. 53, 64-65; 86 S. Ct. 657; 15 L. Ed. 2d 582 (1966). The Court further adopted for such cases the standard for malice set forth in *New York Times Co v Sullivan*, 376 U.S. 254; 84 S. Ct. 710; 11 L. Ed. 2d 686 (1964). Thus,

> construing the NLRA to permit recovery of damages in a state cause of action only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false guards against abuse of libel action, and unwarranted intrusion upon free discussion envisioned by the Act. *Linn*, 383 U.S. at 65.

Because we have concluded that King's protestations before the Wayne city council cannot properly be characterized as statements made in the course of a labor dispute, any qualified privilege a labor dispute may engender does not apply in this instance. This leaves the question of qualified immunity for petitioners under the First Amendment in cases of defamation.

"States . . . retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." *Gertz v Robert Welch, Inc*, 418 U.S. 323, 345-346; 94 S. Ct. 2997; 41 L. Ed. 2d 789 (1974). Accordingly, where a state allows private figures to recover for defamation absent proof of actual knowledge of a false statement or reckless disregard for its truth (in other words, on an ordinary negligence standard), recovery is limited to damages for actual injury. *Gertz*, 418 U.S. at 349-350. The Court held open the possibility that where a state

demands the higher standard of proof, damages may be presumed, and may include a punitive award. *Id.* at 349.

Ordinary negligence is sufficient in proving a case of defamation of a private figure in Michigan. *Rouch v Enquirer & News of Battle Creek*, 427 Mich. 157, 202-203; 398 N.W.2d 245 (1986). The question is whether that standard changes if the alleged defamation takes the form of petitioning a governmental entity.

Plaintiff relies on *Hodgins Kennels, Inc v Durbin*, 170 Mich. App. 474; 429 N.W.2d 189 (1988), *rev'd in part* 432 Mich. 894; 438 N.W.2d 247 (1989), where this Court ruled that because the plaintiffs were not public figures, the defendants "therefore had no qualified privilege regarding alleged defamatory statements made about them, even if all the statements at issue had been directed to petition clause activity . . . ." Defendants assert that *Hodgins* was incorrectly decided and suggest that this Court more recently recognized the actual malice standard, having stated that "knowingly and maliciously made allegations in petitions to government are not protected under the First Amendment from liability for defamation," *Azzar, supra* at 518, citing *McDonald v Smith*, 472 U.S. 479; 105 S. Ct. 2787; 86 L. Ed. 2d 384 (1985), and *Hodgins, supra* at 483. However, *Azzar* was not a defamation case, and it did cite *Hodgins* with approval.

McDonald, supra, concerned a defendant who had written to the President of the United States letters with "libelous and damaging falsehoods" disparaging a public figure who was contending for the position of *United States Attorney*. 472 U.S. at 481-482. The Court reiterated that the right to petition was not absolute, *id.* at 484 ("baseless litigation is not immunized by the First Amendment"), and concluded that such petitioning was not absolutely privileged but lay within

the reach of the law of libel. *McDonald*, 472 U.S. at 484-485. The Court continued:

> Under state common law, damages may be recovered only if petitioner is shown to have acted with malice; 'malice' has been defined . . . in terms . . . considered consistent with *New York Times Co v Sullivan*. . . as 'knowledge at the time that the words are false, or . . . without probable cause or without checking for truth by the means at hand.'" *McDonald*, 472 U.S. at 485, quoting *Dellinger v Belk*, 34 N.C. App. 488, 490; 238 S.E.2d 788 (1977).

The Court concluded, "the Petition Clause does not require the State to expand this privilege into an absolute one. The right to petition is guaranteed; the right to commit libel with impunity is not." *Id.* Because the Court referred to "state common law," as opposed to the body of federal law that gave rise to the distinction between public and private figures, the Court's reference to *New York Times Co v Sullivan* appears to invoke not its public figure/private figure dichotomy, but instead its standard of known falsehood or reckless disregard of the truth.

This reckless disregard standard is a higher one than ordinary negligence. Some "definitions of wilful, wanton, and reckless misconduct are also, in part, 'couched in terms of ordinary negligence . . . .'" *Burnett v City of Adrian*, 414 Mich. 448, 472; 326 N.W.2d 810 (1982). However, "reckless disregard" for consequences is normally regarded as a more culpable state of mind than ordinary negligence. See *Nationwide Mut Fire Ins Co v Detroit Edison Co*, 95 Mich. App. 62, 66; 289 N.W.2d 879 (1980), quoting Prosser, Torts (4th ed), § 34, pp 183-184 ("most courts consider that 'gross negligence' falls short of a reckless disregard of consequences, and differs from ordinary negligence only in degree'"). *See also Gertz, supra* at 349 (likening "knowledge of falsity" to "reckless disregard for the truth").

For these reasons, we conclude that where a defendant makes damaging statements injurious to a private figure in the context of political petitioning, those statements cannot engender liability for defamation if the defendant acted only negligently, but may do so upon a finding that the defendant made the statements knowing that they were false or with a reckless disregard for the truth. Thus, in this instant case, the trial court erred in confining its inquiry to ordinary negligence. Because any award of damages hinges on the presence of actual malice, we remand this case to the trial court for reevaluation of the evidence under that standard.

Reversed in part and remanded. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald

/s/ Gary R. McDonald

/s/ Janet T. Neff

APPENDIX C

STATE OF MICHIGAN IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

Case No. 95-522120-CZ

J&J CONSTRUCTION COMPANY,
Plaintiff,

-vs-

BRICKLAYERS LOCAL 1,
Defendant.

PROCEEDINGS HAD in the above-entitled cause, before the HONORABLE TIMOTHY M. KENNY, Judge, Third Judicial Circuit, Courtroom 1007 City-County Building, Detroit, Wayne County, Michigan, on Thursday, September 4, 1997.

APPEARANCES:

DANIEL J. BRETZ, Esq.,
On behalf of the Plaintiff.

MARY ELLEN GUREWITZ, Esq.,
On behalf of the Defendant.

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EXHIBITS

Indentification	Marked	Received
(None.)		

Detroit, Michigan

Thursday, September 4, 1997

(At 11:39:44 a.m. video mark.)

THE CLERK: J&J versus Bricklayers, 95-522120-CZ.

THE COURT: Appearances for the record, please.

MR. BRETZ: Daniel Bretz on behalf of plaintiff.

MS. GUREWITZ: Mary Ellen Gurewitz for defendants.

THE COURT: All right.

This is the date and time scheduled for the decision in regards to this particular matter.

Let me preliminarily indicate to both sides my appreciation for the excellent job that was done by both sides in present ing the case. I thought the case was very, very well tried by both sides.

In this particular case the allegation made by the plaintiff is that during the Spring of 1995, when attempting to secure a contract with the City of Wayne for the construction of the Wayne Aquatic Center, plaintiff sought to obtain the masonry contract to do the work, and that the defendant, Mark King, who was the business agent for Bricklayers Local Number 1 and acting in his capacity as a business agent, did in fact defame the plaintiff corporation.

Plaintiff goes on to also contend that in August, 1995, Mr. King, the defendant in his capacity as business agent, similarly defamed the plaintiff J&J Construction Company in its efforts to secure the masonry contract to do the Westland Library.

There are 2 causes of action, two counts that appear in the cause of action filed by the plaintiff. The first being an action for defamation.

In an action for defamation, the elements that must be shown by a preponderance of the evidence is number 1, that there has been a false and defamatory statement made concerning the plaintiff.

Second, that it was an unprivileged publication to a third party.

Third, that the defamatory statement was negligently made.

And fourth, that there was actionability per se. And by that I mean that there was a false statement that injured the corporate business reputation.

In this particular case the plaintiff claims that the statements made to the Wayne City Council and the Westland City Council met all 4 elements.

They also contend that Mark King was acting as an agent for the union local, and that the union would be bound and would be liable for the comments made by Mr. King.

The defense claims a number of reasons why a no cause of action should be found. They contend that this was a labor dispute as defined by the statute.

Secondly, they contend that the comments made by Mr. King in his capacity, were in the form of petitioning government by the union, and, therefore, entitled to a qualified privilege.

Second—or additionally, they contend that the comments made by Mr. King were true. They also contend that the comments made were questions and not statements.

Additionally, the defense claims that these comments were made or merely opinions stated by Mr. King.

And finally, they also contend that the Nor Pennington Doctrine (sp.) does in fact bar recovery.

Addressing the first element of defamation, that being the element of whether or not a false and defamatory statement has been made concerning the plaintiff.

Let me deal first of all with the comments regarding the qualities of the work which was one of the defama tory comments.

There are essentially 3 defamatory statements that were made allegedly in this particular case. One dealing with the quality of the work that was done by J&J Construction, the second being whether or not J&J Construction could complete a job on time. And the third being whether or not the prevailing wage had been paid by the plaintiff.

With regards to the quality of the work, what we had in the course of the trial was the testimony of the parties. And the parties' testimony essentially supported their different positions.

Mr. Snyder testified that the quality of the work that he did was not poor, that it was in fact satisfactory performance.

Mr. King testified as did the other defense witness to the effect that the quality of work was not up to par. And I do note, however, during the course of the testimony there was testimony from Mr. Hamlin who was the project superintendent at the Novi High School. He indicated that he was in fact satisfied with the work.

That ultimately the work decision in terms of the work that was done with regards to the meeting of the 2 walls and the work that was done over the doorway was ultimately his responsibility, it was his decision and he made it.

He indicated that he was not dissatisfied with the work and was in fact pleased with the work.

There was also testimony from Mr. Ehlert. Mr. Ehlert testified that he is an structural engineer, he said that he found no faulty workmenship. He indicated that he found that the

photographs that Mr. King had submitted to the city council were in fact misleading. They were close up photos of the tile that showed it in a dirty condition, it was not an accurate representation of what the finished product looked like.

Mr. Ehlert also testified that the photos were a miniscule part of the job. He also submitted, what I found to be persuasive, especially with regards to the quality of the work with regards to the locker room tile, brochures from the tile company, in which there were any number of demonstrated exhibits, examples of the quality of the tile that were submitted that showed the same kind of spacing between the tiles as appeared in the work done at Novi high school.

I credit the testimony that was given by Mr. Hamlin, as well as Mr. Ehlert. I do in fact note that these were witnesses who are not directly tied to the parties other than Mr. Hamlin had in fact been the project superintendent. And if he had been dissatisfied with the quality of J&J's work, certainly was in a position to take corrective action against him.

I note that the defense contends that Mr. Ehlert's testimony should be discredited because he was, I believe in the words of the defense, paid to—paid to testify. That's true of virtually every expert witness who comes to testify in any court proceeding.

I do note that there were no experts offered by the defense other than the testimony of the defendants themselves.

I do find that based on the testimony presented by Mr. Snyder, coupled together with the testimony of Mr. Hamlin and Mr. Ehlert, I do conclude that with regards to the comments made regarding the quality—that poor quality of the work at the Novi high school, I do in fact conclude that the plaintiff has established by a preponderance of the evidence, that that statement was in fact false.

Second allegation was to the effect that the plaintiff could not finish the job on time.

And specifically with reference to the Churchill high school job. Mr. Snyder the plaintiff testified to the effect that he had sufficient personnel to do the job, and that he had extended the job to Held and Held because they knew he was out of work, they did not have work.

Mr. Held did in fact testify to the effect that he was in fact not working at the time and that he did in fact accept the job. There was no evidence introduced by the defense to rebut that.

I do conclude based on the evidence that was presented by Mr. Held and Mr. Snyder that the statement that J&J Construction could not finish a job on time was in fact a false statement.

The third statement has to do with the issue of prevailing wage. And certainly much was made of this issue. I think certainly much more than initially anticipated by either side.

The testimony as presented by Ms. Caporale as well as Mr. Snyder setting forth the terms under which the J&J Employee Welfare Fund was established.

I think the evidence was rather clear that Mr. King acknowledged that he had not received or had not pursued additional paperwork information or any kind of documentation regarding the welfare fund and the payment of prevailing wage.

He did in fact rely on the comments made by 2 former employees of J&J Construction.

Certainly, it appeared to me that at the time and I believe the testimony at the trial by Mr. King supported the notion that Mr. King really did not really have a whole lot of information about the prevailing wage issue others than those 2 comments made by those 2 employees.

As it turns out, I believe that the testimony as presented before me leads me to conclude that the plaintiff has not carried forth its burden of establishing that the comment made regarding the prevailing wage was in fact a false statement by Mr. King.

I say that and indicate that I don't believe that Mr. King's comment was made as a result of any great research on his part. But I think what concerned me was the fact that having viewed the evidence, I did see that it appears that the system for accounting for the fringe benefits under the prevailing wage act as established by the plaintiff is a for want of a better term, a loose system.

It is clear that employees at J&J Construction are not getting fringe benefits from the first day. The same was made known regarding union employees. But the fact of the matter is testimony was presented to the effect that no health care coverage was paid for the first 30 days of employment. Strike that.

There was no health care coverage for J&J employees during the first 30 days of employment.

Having said that, it appears to this court, my understanding, is that if they are not receiving a benefit, they are supposed to receive the cash equivalent.

The testimony was to the effect that the employees were not paid the full cash payment of 29 dollars and 24 cents an hour during that first 30 or up to 59 days of employment when their health care coverage would in fact come into play.

And it also appears to this court that the benefits, the fringe benefits were not portable as they were with the union or refundable either.

So for those reason I do find that the plaintiff has not carried his burden with regards to showing that the statement

made by Mr. King regarding the failure to pay prevailing wage was a false statement.

Second element of defamation has to do with the unprivileged communication.

I think that clearly there was a publication, there is no dispute in this case that Mr. King did in fact get up and speak both before the Wayne City Council as well as the Westland City Council in an effort to persuade both bodies to not award the masonry contract to J&J Construction Company.

The question then becomes with regards to this particular publication was it in fact a privileged or was it an unprivileged publication.

I do find that the publication does not fit within 29 USC section 152 subsection 9. I do find that based on the testimony presented to me that this was not a statement that was made during the course of a labor dispute.

Specifically, I would indicate that while there had been prior picketing of plaintiff's job sites at different locations, that this communication made to the Wayne City Council as well as to the Westland City Council did not involve any circumstance in which the union was seeking to alter terms or conditions of employment with J&J Construction, it was merely an effort to deprive them of making the—getting the contract.

There was no seeking to organize J&J workers. There were no petitions for representation being made too J&J Construction. There were no negotiations going on with regards to the terms and conditions of employment and there was in fact no union election.

The next question that arises with regards to this privilege or unprivileged communication is the issue of whether or not this was protected by the Nor Pennington Doctrine. I do find that the answer to that question is no.

My review of the case law indicates that the Nor Pennington Doctrine is asserted to protect the actions made in petitioning government. Case law shows that the instances in which the Nor Pennington Doctrine has been asserted has been those circumstances involving either a legislative or regulatory setting.

I do not believe that that appears in this particular case where this is an effort not to petition regarding whether or not we should have particular statutes or regulations that should be imposed across the board, but particularly this case involves a petition to the city council in both Wayne and Westland in an effort to get the city to have a particular contractor removed from a particular job.

I also find that there is no qualified privilege in this particular case in light of the fact that I do find that J&J Construction was a private figure, and was not a public official in this particular case so that the qualified privilege does not apply.

The next issue with regards to the element of defamation is with regards to whether or not the statement was negligently made.

I do find certainly based on the evidence that was presented before me, was that the defendant Mark King was in fact an experienced bricklayer before he became a business agent. He was in fact familiar, based on his own personal experience with construction jobs and the way in which construction jobs and masonry contracts in particular were carried out.

In this particular case the evidence clearly indicates that Mr. King went to the Novi high school because he had been—he had received some communication regarding the work that was done at that particular location.

At the time that Mr. King went to the Novi high school he had the opportunity to review and see the extent of the brick

and masonry work that had been done. He did in fact take a series of 10 Polaroid photographs. Those photographs singled out several areas that Mr. King wished to highlight to both the Wayne and the Westland City Council.

In looking at the testimony regarding the total extent of the brick and masonry work that was in fact done at the Novi high school project, these 10 photographs do in fact depict a miniscule portion of that particular project.

There are certainly areas with which the issue of negligence applies. I think I with regards to the brick work that was done, with regards to the connecting walls and over the doorway and also the area regarding the locker room tiles.

With regards to the brick work that was done in the doorway and in the wall, the testimony was to the effect that the final word was with the superintendent of the project, that was not an uncommon determination.

The testimony from several witnesses including Mr. Hamlin was to the effect that if there was a dispute that ultimately the project supervisor would be the one to make the final determination.

There was testimony in this case that there was no checking done by Mr. King regarding this particular job who authorized the work to be done in that particular fashion. The work that was complained about was complained about from aesthetic standpoint as opposed to a functional standpoint.

And I have to look to the fact that this—Mr. King who was an experienced bricklayer did not in fact pursue this issue further.

I also must say that the testimony reflects during the course of trial that Mr. Brazen who was a foreman for J&J Construction on the job, did in fact testify that he saw Mr. King when Mr. King was leaving the job.

Mr. Brazen indicated that Mr. King's comment when he was leaving was that the job "turned out nice".

When Mr. King was asked about that particular encounter with Mr. Brazen he indicated that he could not recall what was said or what was spoken at that time.

So, I am left with the testimony of Mr. Brazen whose testimony I did find credible. Certainly the absence of anything to directly refute it indicating that Mr. King on the one hand had said that the work looked nice, and he did not check out anything further about the brick work that was done.

With regards to the locker room tile photos, they portray certainly the scene in an unfavorable light. As testified by Mr. Elhert whose testimony I credit, it was not an accurate representation of the scene.

Having said that, I think that it is important to—in determining whether or not this was a statement that was neglectedly made, I need to look at not these particular photographs in isolation but to see what type of context these photographs were taken, and with regards to the entire purpose of this photographic exercise.

I think it is important to note that during the course of the testimony comments were made to Douglas Peters by Mr. Cameron at another site where Mr. Peters testified that Mr. Cameron had told him and Mr. Cameron was also a business agent for the local, that Mr. Peters needed to be careful about the poor quality of nonunion work.

And he indicated that the workers at Novi, at the Novi High School project were not high quality workers and that they were going to try to get them off the project.

I do find that when looking at the photographs that were taken, that the photographs not being accurate, that there was no checking to see about the brick work done in the doorway and hall to see who authorized and ordered that that be done.

That that together with the fact that there was, as I had mentioned earlier, no factual basis for comments made regarding insufficient manpower at Churchill High School, where clearly Mr. King or anyone else from the union could have spoken to the union contractor Mr. Held.

I find that when looking at these actions in their totality, I do find that these photographs and the statements that were made were made negligently in terms of the defendant's failure to pursue and check the accuracy of what was being represented to the city council.

Fourth issue with regards to the action for--the elements of defamation involves actionability per se, and that involves the comments that were made to the Wayne City Council about J&J Construction.

Those comments did in fact cost J&J Construction the job. The defense has contended that it was actually the action of city council not Mr. King and the defendants that caused the contract to be lost.

But I think in review of the minutes of the meeting clearly indicate that the concern about the failure to pay prevailing wage and also as what was listed first, the questions about the quality of the work done by J&J Construction was the basis for the failure to award the contract to the plaintiff.

So, I do in fact find that the actions, the statements made about the poor quality of the work to the Wayne City Council were in fact comments that were defamatory and did in fact cost J&J Construction the Wayne Aquatic Center job.

I do find, obviously, the comments that were made by Mr. King did not affect the Westland job.

So I do find that there was a failure to establish or cause any damage to J&J Construction with regards to the Westland project because they did in fact obtain the job.

In conclusion, with regards to the count of defamation, I am satisfied that the statements made by Mr. King meet the elements of defamation and slander. As a business agent his comments do in fact bind the union and the union also is liable for the comments made by Mr. King, because they were made in his capacity as a business agent of the defendant union.

I do find that the comments that were made were not merely questions that were raised nor were they merely opinions stated, but they were defamatory statements, they were made as I find as declaratory statements made with the intention of preventing the plaintiff from getting the contract.

I do find that it was not part of any labor dispute nor was it covered under the Nor Pennington doctrine.

And I do find that the statements that were made to the city council, the Wayne City Council, reflecting the quality of work was in fact defamatory and was a proximate cause of the damages suffered by the plaintiff.

Second count involves a tortious interference with a business relationship or expentancy. There are 4 elements with regards to that particular cause of action.

One of them being, the first element being that there must be a contract or a business relationship or expectancy with a third party. That clearly is established with the fact there was an contract that was sought with the City of Wayne. There was also a contract sought and there was a contract eventually obtained from the City of Westland.

Secondly, there must be knowledge by the defendant of that expectency. That clearly is established by the fact that Mr. King appeared at the council meetings, spoke to the city council, both at Westland and in Wayne, in an effort to determine that or an attempt to try to prevent plaintiff J&J Construction from obtaining the masonry contract.

Third, there must be an intentional or an improper interference by the defendant inducing or causing a breach of or termination of the expectancy.

I do in fact find the case law does in fact support the fact that an act of slander or defamation can in fact amount to an improper interference.

For reasons stated earlier on the record, I do find that the defamation does in fact establish the interference that induced the termination of the expectancy.

With regards to the fourth element there must in fact be damages. With regards to the Westland incident I find that they were no damages suffered by the plaintiff.

With regards to the Wayne Aquatic Center contract I do find that there was—that there were damages, those damages being the lost profit realized from the loss of contract.

With regards to the issue of damages, with regards to the Wayne City contract, it is my finding that the damages in this case as suffered by the plaintiff are in fact the lost profits that would have resulted from the completion of this particular contract.

The contract as bid by the plaintiff for this particular project was 2 hundred and 41 thousand 2 hundred dollars.

During the course of the testimony, Mr. Jonathan Snyder did in fact indicate that with regards to this particular project the Wayne Aquatic Center, he testified, and there was no testimony to the contrary, that he expected that his company would realize a profit of 24 percent.

My calculation is that the 24 percent of the 2 hundred and 41 thousand 2 hundred dollar contract bid is in fact a lost profit of 57 thousand 8 hundred and 88 dollars.

I do in fact find that this was the loss profit and damage with regards to the Wayne City contract.

I will discuss the fact that there was a request in the plaintiff's claim for relief, that there was other work that was lost, that there was a decrease of well over a hundred thousand dollars in other profits that could have been made another revenue that was not obtained because there was an effort to try to obtain this Wayne City contract.

Based on my review of the evidence I am not satisfied that the evidence presented indicated that any revenue that was not obtained is directly attributable to the defamation that occurred.

There was an election that was made not to pursue other projects, but to try to get the Wayne contract back. There was also testimony to the effect that the project in Wayne would not have begun in 1995 anyway. That the work did not actually begin until 1996 or late 1995.

So that that was not, they were not monies that would have been realized in 1995 anyway. Plaintiff has to fact introduced evidence to the effect that his corporate profits have in fact gone up in '95 and '96—strike that, it has gone up '94, '95, '96, each year has been more successful than the previous one. So I find that the damage is limited to the lost profit.

With regards to Westland the contract was in fact obtained, the work was in fact done, and the profits were realized.

Once again, I would indicate that since performing the contract, since the comments made by Mr. King, J&J Construction has in fact seen their profits go up, with a defamation comments have not ruined J&J's business.

I find it would be a matter of speculation to conclude what additional profits there might have been, if the defamatory comments had not been made.

So, I do find that there's no damage with regards to the Westland contract. And for the reasons just stated I find that there are no special damages as well.

With regards to the request for instructive relief that was made by the defendant or by the plaintiff in this case. There is a concern on my part, with regards to imposing future injunctive concern, if you will, or penalties, especially when it deals with the issue of first amendment, free speech.

Certainly I would think that based on my ruling today, that there is the notion that falls and defamatory statements are not ones that are made without any consequence, I will not however at this time enjoin or restrict speech on the part of the union or Mr. King.

I would also indicate that with regards to the request for an ad to be placed in the newspapers, I am not going to do that, I'm going to deny that request.

As I have indicated I don't think that the business reputation has been hurt, certainly throughout southeastern Michigan area it has not.

I know that, I think quite frankly I thought that perhaps putting something like that in the paper might cause more concern than be of benefit. But I recognize that's plaintiff's option and I am not second guessing their wisdom, but I do think that the damages relief as awarded in this particular case is sufficient, and is the appropriate remedy.

And finally with regards to plaintiff's request that for attorneys fees pursuant to MCLA 600.2911 subsection 7 it does call for the award of attorney fees if I deem that that's appropriate.

I do believe that's appropriate in this particular case, and that issue I will reserve for Mr. Bretz to submit on a further motion providing the defense the opportunity to contest any fees that are submitted.

MS. GUREWITZ: Sorry, would you repeat that again please?

Did you say you were awarding attorney fees or you're asking him to make a further motion?

THE COURT: I am granting—I am granting the attorney fees, but I'm saying that it is subject to a hearing on the reasonableness of those fees.

And that will be the subject of a hearing after they have have been submitted to you, Ms. Gurewitz and you have the opportunity to contest it and challenge it. All right?

MR. BRETZ: Thank you, Your Honor.

(At 12:20:57 p.m. matter concluded.)

REPORTER'S CERTIFICATE

STATE OF MICHIGAN)

)

COUNTY OF WAYNE)

I, RICHARD JOSEPHS, CSR-2345, Official Court Reporter in and for the Third Judicial Circuit, Wayne County, State of Michigan, do hereby certify that the foregoing pages 1 through 26 inclusive, comprise a rendition of the videotaped proceedings taken in the above-entitled matter, on Thursday, September 4, 1997.

/s/ Richard Josephs
Richard Josephs, RPR, CMRS, CSR-2345
Certified Manager of Reporting Services
Registered Professional Reporter

STATE OF MICHIGAN IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

Case No. 95-523120-CZ

J & J CONSTRUCTION CO.,
Plaintiff,

-vs-

BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 1,
AND MARK KING, JOINTLY AND SEVERALLY,
Defendants.

JUDGMENT

HON. TIMOTHY M. KENNY

At a session of said Court, held in the City County Building, City of Detroit, County of Wayne, State of Michigan on Nov 07 1997

PRESENT: HON. TIMOTHY M. KENNY
Wayne County Circuit Court Judge

THIS MATTER having been tried before the Court, sitting without a jury, and the Court having considered the testimony and exhibits presented and the arguments of counsel, and being otherwise well advised in the premises, for the reasons set forth in the Court's Opinion announced from the bench on September 4, 1997, which Opinion is expressly incorporated herein, it is ORDERED, as follows:

1. Judgment is granted in favor of the Plaintiff, J & J CONSTRUCTION CO., and against the Defendants, BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 1, and MARK KING, Jointly and Severally, on Plaintiff's claim of defamation stated in Count I of the Complaint.

2. Judgment is granted in favor of the Plaintiff, J & J CONSTRUCTION CO., and against the Defendants, BRICKLAYERS AND ALLIED CRAFTSMEN, LOCAL 1, and MARK KING, Jointly and Severally, on Plaintiffs claim of tortious interference with business expectancy and relations, stated in Count II of the Complaint.

3. Plaintiff is awarded damages in the amount of Fifty-Seven Thousand Eight Hundred Eighty-Eight and 00/100 ($57,888.00) Dollars, and actual costs and attorneys' fees, pursuant to *MCLA 600.2911(7)*, in the amount of One Hundred Four Thousand Two Hundred Eighty-Six and 95/00 ($104,286.95) Dollars. Plaintiffs request for mediation sanctions is denied.

4. Plaintiff is also awarded statutory interest an the entire amount of the money Judgment, including attorney fees and other costs, from the date the Complaint was filed, in the amount of Twenty-Six Thousand Forty-Four Dollars and 51/00 ($26,044.51) Dollars.

5. The total of the foregoing Judgment is One Hundred Eighty-Eight Thousand Two Hundred Nineteen Thousand and 03/100 ($188,219.46) Dollars, payable by Defendants jointly and severally to Plaintiff.

6. This Judgment shall bear interest at the statuto rate from the date of entry.

/s/ Timothy M. Kenny
Circuit Court Judge

Agreed as to form and for entry:

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APPENDIX D

SUPREME COURT OF MICHIGAN

No. SC: 119357

J & J CONSTRUCTION COMPANY,
Plaintiff-Appellant,

v.

BRICKLAYERS AND ALLIED CRAFTSMEN,
LOCAL 1, AND MARK KING,
Defendants-Appellees.

September 12, 2003, Decided

OPINION: Rehearing No. 495

In this cause, a motion for rehearing is considered and it is DENIED.

Cavanagh and Kelly, JJ., would grant rehearing.

(2)

No. 03-667

Supreme Court, U.S.
FILED
DEC - 4 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

BRICKLAYERS AND ALLIED CRAFTWORKERS LOCAL 1, and MARK KING,

Petitioners,

v.

J & J CONSTRUCTION COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Michigan

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Michigan Supreme Court correctly held that the First Amendment does not provide qualified immunity for defamation of a private figure where the defamation is committed in the context of petitioning activity?

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COUNTER-STATEMENT OF THE CASE

For purposes of the Petition, the factual background of this action is simple, straightforward and not subject to dispute. At no stage of this case have Petitioners challenged the facts found by the trial court or claimed that those findings were not supported by the evidence presented at trial.

Respondent, J & J Construction Company, was the lowest responsible bidder for the masonry portion of a swimming pool project to be constructed by the City of Wayne, Michigan. Petitioner Mark King, a business agent for Petitioner Bricklayers and Allied Craftworkers Local 1, appeared at the meeting of the Wayne City Council where J & J Construction's bid was being considered. At that meeting King made false statements that J & J Construction did poor quality work and did not have enough manpower to staff the job. Pet. App. 61a, 62a.[1] As a direct result of Petitioners' defamation of J & J Construction, the Wayne City Council awarded the contract to another bidder.

There is no dispute that King was acting as an agent of the Union when he made the defamatory statements. It is also undisputed that King never mentioned his affiliation with the Union during the meeting or raised the existence of any labor dispute involving J & J Construction.

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[1] In addition, King distributed inaccurate photographs, showing a minuscule portion of a previous project, which he falsely claimed depicted poor workmanship on the part of J & J Construction. Pet. App. 67a.

Petitioners attempt to raise issues regarding whether their defamation was the cause of J & J Construction's damages, and whether J & J Construction, characterized by Petitioners as "a person who performs a public function or who seeks to perform a public function," is something other than a private figure.

As acknowledged in the Petition, however, the trial court specifically found that King's statements "[were] in fact defamatory" and "did in fact cost J & J Construction the Wayne Aquatic Center Job." Pet. App. 68a. The trial court also specifically found "that J & J Construction was a private figure, and was not a public official in this particular case. . . . " *Id.* at 65a.

The record in this case establishes that J & J Construction is a private figure which sustained damages as a direct result of false, defamatory statements made to the Wayne City Council. The Petition must be considered, and rejected, upon this clear, unchallenged factual background.

REASONS FOR DENYING THE PETITION

The Petition is based on asserted conflict between the decision of the Michigan Supreme Court in this case and 1) decisions of the Seventh Circuit United States Court of Appeal and of the supreme courts of Maryland and Washington; and 2) this Court's decision in *McDonald v. Smith*, 472 U.S. 479 (1985). These purported conflicts are non-existent.

A. The Michigan Supreme Court Decision Does Not Conflict With Any United States Court of Appeal or Highest State Court Decision.

In reinstating the trial court's judgment in favor of J & J Construction on its defamation claim, the Michigan Supreme Court held that "a defamation defendant whose statements about a private figure are made while petitioning the government is not constitutionally entitled to a qualified immunity in the form of the heightened 'actual malice' standard." Pet. App. 9a. None of the cases upon which Petitioners rely conflicts with this holding, for the simple reason that in none of the cases was the issue of qualified immunity for defamation of a private figure presented.

In *Stevens v. Tillman*, 855 F.2d 394, 403 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989), the Seventh Circuit specifically acknowledged that the plaintiff "was a public *official* – just like the [plaintiff] in *New York Times v. Sullivan*. . . . "[2] This finding was sufficient to justify application of the "actual malice" standard of proof to the plaintiff's defamation action. The Seventh Circuit did not, and had no need to, address the existence or extent of any petitioning privilege regarding defamation of a private figure.

In *Miner v. Novotny*, 304 Md. 164, 498 A.2d 269 (1985), the plaintiff was a deputy sheriff and, thus, unquestionably a public official. In ruling that the defendant did not enjoy an *absolute* privilege from defamation liability, the court stated that, "[i]n light of *McDonald*, the

[2] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

qualified privilege recognized in *New York Times* and its progeny constitutes the *extent* of the constitutionally-mandated protection" of the Petition Clause. 498 A.2d at 272 (emph. added). The opinion cannot be read as expressing any holding regarding whether defamation of a private figure requires proof of actual malice.

Similarly, in *Richmond v. Thompson*, 130 Wn.2d 368, 377, 922 P.2d 1343, 1348 (1996), the court noted that the plaintiff was "a public official under *New York Times*." The plaintiff argued that a privilege "broader than the *New York Times* qualified privilege" should be applied when the public official is a police officer. Relying on *McDonald*, the Washington Supreme Court rejected this assertion, but expressed no opinion on the application of *New York Times* to defamation of a private figure.

The *only* case cited by Petitioners which actually addressed the application of the Petition Clause in a private figure defamation action is consistent with the decision of the Michigan Supreme Court here. In *In re IBP Confidential Business Documents Litigation*, 797 F.2d 632 (8th Cir. 1986) (*en banc*), 800 F.2d 787 (8th Cir. 1986) (rehearing *en banc*), *cert. denied*, 479 U.S. 1088 (1986), the Eighth Circuit directly held that where a defamation plaintiff is a private figure, the qualified privilege/actual malice standard under *New York Times* is inapplicable.

There is no conflict between the decision of the Michigan Supreme Court in this action and *any* decision of a United States Court of Appeals or the highest court of any State.

B. The Michigan Supreme Court's Decision Does Not Conflict With This Court's Decision in *McDonald v. Smith*.

In *McDonald v. Smith*, this Court was not presented with any issue regarding the existence or extent of a Petition Clause privilege against liability for defamation of a private figure. Although the fact was not discussed in the Court's opinion, the plaintiff was clearly a public figure who would have been subject to the *New York Times* actual malice standard in any other defamation action.

The principal *basis* for the Court's decision is found in the following language from the opinion, which has been either referred to or directly quoted in the cases relied upon by Petitioners:[3]

> The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish and assemble. [Citation omitted.] These First Amendment rights are inseparable [Citation omitted], and there is no sound basis for granting greater constitutional protection for statements made in a petition to the President than other First Amendment expressions.

McDonald, 472 U.S. at 485.

The Michigan Supreme Court's holding was expressly based on the determination that "the United States Supreme Court has concluded that the right to petition should be accorded no greater protection than the rights to

---

[3] *See, Miner v. Novotny*, 498 A.2d at 271; *Richmond v. Thompson*, 922 P.2d at 1349.

free speech and free press. *McDonald*, *supra* at 485." Pet. App. 9a. Accordingly, the court upheld the trial court's conclusion that J & J Construction was required to establish only that Petitioners' defamation was negligent in order to recover its damages. This ruling is in accord with this Court's determination in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), that the First Amendment requires only that a private figure establish fault at least amounting to negligence in order to recover actual damages for defamation.

The trial court properly found that Petitioners, through King, made false, defamatory statements in a meeting of the Wayne City Council for the purpose, and with the desired effect, of depriving J & J Construction of the masonry contract for which it was the lowest responsible bidder. The trial court also properly found that the defamatory statements were *at least* negligently made. Under Michigan law, sanctioned by this Court's First Amendment decisions, these findings justified the judgment rendered in favor of J & J Construction.

The Michigan Supreme Court's decision upholding the defamation judgment is consistent with both the letter and the reasoning of this Court's decisions in *McDonald*, *New York Times* and *Gertz*, and Petitioners have shown no reason why their petition for a writ of certiorari should be granted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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No. 03-667

IN THE

Supreme Court of the United States

BRICKLAYERS AND ALLIED CRAFTWORKERS LOCAL 1, and MARK KING,

Petitioners,

v.

J & J CONSTRUCTION COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Michigan

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The question presented by this case and by our petition for certiorari is:

> "Whether, under the First Amendment's Petition Clause, statements addressed to government representatives critical of a third party's performance of a public function or fitness to perform a public function are entitled to the protection of the 'actual malice' standard of *New Times Co. v. Sullivan*, 376 U.S. 254 (1964), against defamation claims brought by the third party." Pet. i.

In the petition, we showed that the lower courts are divided on this question, with the Seventh Circuit and the highest courts of Washington and Maryland according petitioning statements the full protection of the *New York Times* "actual malice" standard and the Michigan Supreme Court and the Eighth Circuit refusing to accord petitioning statements such protection. *See* Pet. 10-14. We showed, as well, that this division cannot be traced to any disagreement over basic First Amendment principles and arises, instead, from a disagreement as to the proper reading of—and the proper inferences to be drawn from—this Court's decision in *McDonald v. Smith*, 472 U.S. 479 (1985). *See* Pet. 16-19.

Respondent's brief in opposition asserts that there is no such division among the lower courts because the Seventh Circuit, Washington and Maryland cases we cite involved petitioning statements critical of government employees rather than "private figures" and, according to respondent, the status of the defamation plaintiff was the basis of each decision. Br. in Opp. 3-4. Respondent's effort to wish away the lower court conflict fails.

There can be no question that the Seventh Circuit, the Washington Supreme Court and the Maryland Court of Appeals accorded Petition Clause protection to the statements

in question and applied the *New York Times* "actual malice" standard on the basis, to use Judge Arnold's apt phrase, of "the nature of the communication and not the *status* of the defamation plaintiff." *IBP Confidential Business Documents Litigation*, 800 F.2d 787, 789 (8th Cir. 1986), *cert. denied*, 479 U.S. 1088 (1987) (Arnold, J., dissenting) (internal quotation marks omitted; emphasis in original).

In *Stevens v. Tillman*, the Seventh Circuit identified "*two* grounds"—a Free Speech Clause ground and a Petition Clause ground—for applying the *New York Times* standard: "that [the plaintiff] is a public official, *and* that the speakers were exercising their right to petition the government for redress of grievances." 855 F.2d 394, 403 (7th Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989) (emphasis added). As to the Petition Clause ground, the Seventh Circuit concluded that "statements made directly to [government representatives] are governed by the *New York Times* standard under the holding of *McDonald v. Smith*, 472 U.S. 479 (1985)." *Id.* In elaborating on this ground of its decision, the Seventh Circuit explained:

> "The first amendment prohibits efforts to ensure 'laboratory conditions' in politics; speech rather than damages is the right response to distorted presentations and overblown rhetoric. A campaign to influence [government representatives] is classic political speech; it is direct involvement in governance, and only the most extraordinary showing would permit an award of damages on its account." *Id.*

Similarly, in *Richmond v. Thompson*, 130 Wn.2d 368, 922 P.2d 1343 (1996), the Washington Supreme Court rested its ruling that the *New York Times* "actual malice" standard applied on two grounds: the "public official" status of the plaintiff, *id.* at 1348, *and* the petitioning nature of the speech in question, *id.* at 1349. As to the latter, the *Richmond* court

held that "the proper standard under the petition clause must be the *New York Times* qualified privilege." *Id.*

"[W]here there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court and of equal validity with the other.'" *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 486 (1924) (quoting *Union Pacific R.R. Co. v. Mason City & Fort Dodge R.R. Co.*, 199 U.S. 160, 166 (1905). Thus, the fact that the Seventh Circuit and the Washington court rested their decisions on both a Free Speech Clause ground and a Petition Clause ground does nothing to lessen the authority of their Petition Clause rulings that whenever "speakers [a]re exercising their right to petition the government for redress of grievances," the Petition Clause requires that their "statements made directly to the [government] . . . are governed by the *New York Times* standard." *Stevens*, 855 F.2d at 403.

The First Amendment ruling in *Miner v. Novotny*, 304 Md. 164, 498 A.2d 269, 271 (1985), is based solely on "the constitutionally-based privilege attaching to petitions to the government for redress of grievances." The Maryland Court of Appeals rested its decision that the *New York Times* "actual malice" standard applied on the petitioning nature of the speech in question and does not even refer to the "public" or "private" status of the defamation plaintiff. *Id.* at 271-272.

The *Stevens*, *Richmond*, and *Miner* decisions thus *require* the federal district courts within the Seventh Circuit and the state courts of Washington and Maryland to accord *New York Times* protection to *all* petitioning statements critical of a third person's performance of or fitness to perform a public function without regard to the third person's "public" or "private" status. In contrast, the decision below and the *IBP* decision *preclude* the state courts of Michigan and the federal district courts within the Eighth Circuit from according *New York Times* protection to such petitioning statements where

the person whose performance of or fitness to perform a public function is being criticized is a "private figure," such as a government contractor.[1]

This sharp outcome-determinative division among the lower courts on the scope and nature of the Petition Clause protection for statements made directly to the government concerning a third party's performance of or fitness to perform a public function—and of the proper reading of this Court's *McDonald v. Smith* decision—is not only of great doctrinal significance, it is also of great practical importance. "Americans by the thousands are being sued, simply for exercising . . . the right to communicate [their] views to [their] government officials . . . on public issues." G. Pring & P. Canan, *SLAPPs; Getting Sued for Speaking Out* 1 (1996). By far the greatest number of such SLAPP suits are filed by "private figures" like J & J Construction—companies that see petitioning activities as "threats to their land ownership, development plans, business operations, contract expectations, profits, or employment." *Id.* at 216.

The Court should grant certiorari to resolve the disagreement among the state and federal courts over the important First Amendment question presented by this case.

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[1] It is not at all clear that the federal district courts within the State of Michigan would rule in the same way as the Michigan courts in this regard, as the Sixth Circuit has expressed its agreement with the Seventh Circuit that "statements made directly to [government representatives] are governed by the *New York Times* standard under the holding of *McDonald v. Smith*, 472 U.S. 479 (1985)." *Eaton v. Newport Board of Education*, 975 F.2d 292, 299 (6th Cir. 1992), quoting *Stevens*, 855 F.2d at 403.

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No. 03-667

IN THE

Supreme Court of the United States

BRICKLAYERS AND ALLIED CRAFTWORKERS LOCAL 1 and MARK KING,

Petitioners,

v.

J & J CONSTRUCTION COMPANY,

Respondent

On Petition for a Writ of Certiorari to the Supreme Court of Michigan

MOTION AND BRIEF OF PUBLIC CITIZEN AND NATIONAL CENTER FOR TOBACCO FREE KIDS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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December 4, 2003

MOTION OF PUBLIC CITIZEN AND NATIONAL CENTER FOR TOBACCO FREE KIDS FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONERS

Movants Public Citizen and the National Center for Tobacco Free Kids move the Court to grant them leave to file the accompanying brief as amici curiae in support of the petition for a writ of certiorari. The petition raises the question of whether libel claims based on statements contained in petitions to government officials or bodies are protected by the same qualified immunity as statements about public officials and public figures.[1]

Public Citizen is a non-profit organization based in Washington, D.C., with about 150,000 members. Since its founding by Ralph Nader in 1971, Public Citizen has urged citizens to petition their governments – national, state, and local – for redress of grievances related to the activities of individuals, corporations, public officials, and unions, and it has advocated a variety of protections for the rights of consumers, citizens and employees to encourage them to do so. Public Citizen itself files numerous petitions every year, including petitions directed to such federal agencies as the Food and Drug Administration, requests to legislators to enact legislation, and lawsuits filed in the courts. *E.g.*, http://www.citizen.org/publications/index.cfm?sectionID=106&catID=126. Along with its efforts to encourage public participation, Public Citizen has brought and defended numerous cases involving the First

---

[1]Petitioners have consented to the filing of the amicus brief; a copy of a letter from petitioner's counsel has been lodged with the Clerk. Respondent objects to the motion.

Amendment rights of citizens who participate in public debate.

The National Center for Tobacco Free Kids works to protect minors from tobacco by raising awareness that tobacco is a pediatric disease, by changing public policies to limit marketing and sales of tobacco, and by altering the environment in which decisions about tobacco use and tobacco policy are made. The Center and other public health organizations with whom it works frequently petition various federal agencies, such as the Food and Drug Administration, the Federal Trade Commission and the Occupational Safety and Health Administration, to address what they believe are important public health issues related to tobacco.

Both from their own petitioning activities and from those of its members, amici have learned of the intimidating effect of lawsuits filed over petitioning activity. In recent years, amici have watched with dismay as an increasing number of companies have resorted to litigation to prevent ordinary citizens from speaking out to their government representatives about the manner in which companies have conducted their affairs, and from urging the government to take actions against the companies. In a number cases, companies have brought suit, hoping to silence their critics through the threat of ruinous litigation. The mere threat of litigation, and the prospect of being held liable if a court second-guesses the truth of any statement made in the course of petition activity, can easily discourage citizens from exercising the right to petition the government.

Unlike petitioners, amici and their members file their petitions to secure purely political objectives – such as protecting the public from unsafe products, an unhealthy environment, or unlawful trade practices – not to advance their own economic interests. Amici seek leave to file this brief to urge the Court to protect the quintessentially political activity

that the Petition Clause was intended to foster, by extending to all Petition Clause activity the fullest measure of First Amendment protection that the "actual malice" standard accords to speech about public officials and public figures.

Respectfully submitted,

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December 4, 2003

QUESTION PRESENTED

Under the First Amendment's Petition Clause, are statements addressed to government representatives that criticize a third party entitled to the protection of the qualified privilege for criticisms of public officials and public figures recognized under *New York Times v. Sullivan* against defamation claims brought by the third party?

INTEREST OF AMICI CURIAE

The interest of amici curiae is set forth in the accompanying motion for leave to file as amici curiae.

ARGUMENT

In *McDonald v. Smith*, 472 U.S. 479 (1985), the Court refused to grant absolute immunity under the Petition Clause of the First Amendment to a person who is sued for libel based on statements made in the course of communications to a public official. However, the Court's characterizations of the protection that the Petition Clause **does** provide have given rise to varying constructions in the lower state and federal courts that threaten to discourage citizens from engaging in petition activity, and that are at the heart of the petition in this case.

The bulk of the Court's discussion was devoted to two lines of analysis showing the existence of a qualified privilege requiring a showing of malice before liability may be imposed for petitioning activity. First, the original understanding of the Petition Clause, as shown by cases during the first half of the nineteenth century discussing the common law petition privilege, characterized the privilege as excluding "malicious and wanton" speech, 472 U.S. at 483-484 (discussing early cases involving the common law petition privilege). Second, the Court observed that because its Petition Clause cases, in contexts other than defamation, denied protection to "baseless litigation," the Clause was not understood to protect intentional and reckless falsehoods. *Id.* at 484.

On the other hand, the penultimate paragraph of the opinion in *McDonald* stated that the Petition Clause "was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish and assemble, . . . and there

[1/] This brief was written solely by undersigned counsel and not even in part by counsel for a party. Its preparation and submission were financed solely by Public Citizen with no support from any party.

is no sound basis for granting greater constitutional protection to statements made in a petition to the President than other First Amendment protections." *Id.* at 485. Then, in its concluding paragraph, *id.*, the Court noted that state law allowed recovery only if the defendant acted with "malice," a term defined consistent with the actual malice standard of *New York Times v. Sullivan*, 376 U.S. 254 (1964); the Court refused to construe the Petition Clause as expanding this privilege to an absolute one. 472 U.S. at 485.

Several lower courts, including the Seventh Circuit and the Washington Supreme Court and the Maryland Court of Appeals, have followed the Court's actual discussion of the Petition Clause in the first part of its opinion to conclude that the Clause confers protection against liability unless the defendant has made false statements with actual malice.[2] The Eighth Circuit, however, understood the sentence finding "no sound basis for . . . greater protection to . . . a petition . . . than other First Amendment protections" as meaning that, when other parts of the First Amendment allow liability to be imposed for negligence, the Petition Clause also does not provide any further protection.[3] In the decision below, the Michigan Supreme Court sided with the Eighth Circuit against the other lower courts in its construction of *McDonald.*[4]

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[2]*Stevens v. Tillman*, 855 F.2d 394 (7th Cir. 1988); *Miner v. Novotny*, 498 A.2d 269 (Md. 1985); *Richmond v. Thompson*, 922 P.2d 1343 (Wash. 1996)

[3]*In re IBP Confidential Business Documents Litigation*, 797 F.2d 632 (8th Cir. 1986) (*en banc*).

[4]In a special concurrence, Justice Young analyzed the original understanding of the Petition Clause and concluded

The majority approach is the better one. It is the more sensible construction of the Court's opinion in *McDonald* because, if allegedly libelous statements contained in petitions to the government are protected only to the extent that they are already protected under the Free Speech Clause, then the result would be not that the Petition Clause protects only as much as the Free Speech Clause does, but that the Petition Clause protects not at all, or at least that it is mere surplusage in the First Amendment. If the Petition Clause is to mean anything in the libel context, it must be that statements receive maximum protection under the First Amendment regardless of whether the statements are in a petition to government agencies in the legislative, executive, or judicial branches of government, and regardless of who is criticized in the petition.

This understanding of the protection provided by the Petition Clause is also the most consistent with the considerations that animated the creation of the *New York Times* standard for protection of statements about public officials and public figures, which are equally applicable to statements contained in petitions directed to government officials for the redress of grievances. Just as public officials and public figures may be presumed to have access to the media and other means of communication to publicize their responses to allegedly defamatory criticism, a petition for redress of grievances is, by its nature, addressed to a limited audience – a judge, a legislative body, or an administrative agency – and a person who claims to have be defamed in the petition should be able to direct a response to the criticisms to the same audience.

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that it required protection for petitioners, but he joined the judgment on the ground that *McDonald* departed from that original understanding and he was bound by *McDonald* until it was reversed by this Court.

And, just as statements about public officials and public figures deserve maximum protection under the First Amendment because such statements go to the heart of the democratic process, so similarly petitions to government officials and government bodies for redress of grievances go to the heart of the democratic process that the First Amendment was designed to protect.

Extending the *New York Times* standard to all libel claims based on statements made in a protected petition would also be most consistent with the Court's Petition Clause cases, which have required not just that the petitioner must have made baseless claims or statements, but also that the statements have been made for a bad motive. In antitrust cases under the *Noerr-Pennington* doctrine, for example, the claims in the petition must have been made for the purpose of suppressing competition, and the petitions must have been ones on which the defendant knew that it could not succeed or, at least, was indifferent to the possibility of success. *Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 65-66 (1993). The fact that the cause of action is for libel rather than restraint of trade should not reduce the degree of protection provided by the First Amendment. *Cf. Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

Similarly, under *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), for a libel lawsuit to be actionable under the National Labor Relations Act, the lawsuit must not only have been baseless, but it must have been brought without any reasonable basis – *i.e.*, it must have been brought for the purpose of retaliating against workers who exercise their rights under the NLRA. This combination of falsity and bad motive is comparable to the *New York Times* requirement that falsity be accompanied by knowledge of falsity, or by reckless indifference to probable falsity.

Because the lower courts have reached conflicting conclusions about whether the First Amendment confers a *New York Times*-like privilege on all petitions to the government, or whether the full protection of the Petition privilege depends on whether the petition is directed at a government official or public figure, the Court should grant certiorari to resolve this conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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